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Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions

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Introduction

Public policy analysis is no stranger to American products liability law. Countless books and law review articles identify the policies justifying liability for harm caused by defective products.[1] Most of this commentary is normative—writers assert that a given policy or set of policies is socially and morally appropriate and then evaluate judicial decisions in light of those norms. By contrast, few writers have approached the subject of judicial reliance on policy from an empirical perspective. Only a handful of commentators, focusing on areas other than products liability, have purported to describe actual patterns of judicial reliance on policy norms.[2] The commentators who have described reliance on policy have based their conclusions on relatively few items of information drawn from dozens,

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1. *See, e.g.*, R. EPSTEIN, MODERN PRODUCTS LIABILITY LAW, ch. 4 (1980); Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593 (1980); Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976); Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965); Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); A. Schwartz, *Products Liability and Judicial Wealth Redistributions*, 51 IND. L. REV. 558 (1976).

2. *See* Daynard, *The Use of Social Policy in Judicial Decision-Making*, 56 CORNELL L. REV.

or at most, several hundred, reported decisions.[3] The limited scope of such factual inquiries necessarily limits the relevance of their findings.[4]

In contrast to the policy-oriented empirical work published thus far, this Article's findings are based on a systematic coding of thousands of published products liability decisions drawn from all American jurisdictions over the last decade.[5] The Article identifies the different types of policies relied upon, together with the relative frequencies with which courts have relied upon them. In addition, the Article compares the frequencies of reliance in state courts versus federal courts, trial courts versus appellate courts, and intermediate versus highest courts of appeals. It also correlates judicial reliance upon public policy with a number of other variables, including categories of substantive issues, presence of concurring or dissenting opinions, and other like factors.

Describing patterns of judicial reliance upon public policy is both practically and theoretically important. From a practical standpoint, lawyers familiar with judicial use of policy can evaluate judges' inclinations to decide issues of law based, ostensibly at least,[6] upon policy reasoning rather than strictly upon precedent. From a

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919 (1971); Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law,* 1988 ANN. SURV. OF AM. L. 73; Note, *Economic Analysis in the Courts: Limits and Constraints,* 64 IND. L.J. 769 (1989); Note, *How Appellate Opinions Should Justify Decisions Made Under the U.C.C.,* 29 STAN. L. REV. 1245 (1977). One massive study of almost 6000 decisions by state supreme courts, conducted in the mid-1970s, examined the shifts in styles of decisionmaking over a one-hundred year period. Although the study did not focus on policy, as such, it provides a model of how empirical studies should be performed. *See* Friedman, Kagan, Cartwright & Wheeler, *State Supreme Courts: A Century of Style and Citation,* 33 STAN. L. REV. 773 (1981). Recently, a commentator discussing the forms of moral argument employed in tort decisions explicitly lamented the unavailability of empirical verification for his theories: "Although I ground my observations in what courts have said . . . it should be clear that I cannot document all observations [about policy] in the same way that I can support statements about tort doctrine . . . ." H. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW, 169 n.7 (1987). For a general lament that too little empirical work is performed, see Schuck, *Why Don't Law Professors Do More Empirical Research?,* 39 J. LEGAL EDUC. 323 (1989).

3. The article by Daynard, *supra* note 2, was based on three samples of 100 decisions each; the Note in the Indiana Law Journal, *supra* note 2, did not employ a sampling technique; and the Note in the Stanford Law Review, *supra* note 2, was based on a sample of 20 decisions.

4. For example, the sample in the Stanford Law Review Note, *supra* note 2, was too small to support its conclusions with any confidence. The sample in the Daynard article, *supra* note 2, was large enough to support his overall assertions regarding frequencies of reliance upon policy, but the author sought to correlate those frequencies with only three variables: identity of court, political tendency of results, and political background of judges. The present study correlates frequencies of reliance with no fewer than fifteen variables.

5. As a subsequent discussion of methodology explains, an effort was made to include nearly all of the published products liability decisions during the relevant time period. Accordingly, problems relating to sample size do not arise.

6. One must distinguish the process of reaching the decision from the process of

theoretical perspective, accurately describing courts' explicit use of public policy helps commentators measure the influence of legal scholarship on judicial decisionmaking and opinion writing. For example, based upon the high frequency with which efficiency goals have been discussed in products liability commentary,[7] one might expect that recently published products liability decisions would rely explicitly upon efficiency goals more frequently than on other policy objectives. This study tests this hypothesis, together with several others. More generally, the findings contained herein should prove useful to scholars studying the analytical methods by which judges purport to decide issues of law.[8] In most American law schools, much attention is paid to the social policies presumed to underlie judge-made legal doctrine.[9] A more systematic and accurate understanding of how courts justify their decisions should assist and enlighten these scholarly endeavors.

Part I of this Article provides the theoretical and analytical background for the empirical analysis. It defines the term "public policy" and explains what is meant when a court is said to rely upon public policy. Using illustrative examples drawn from products liability decisions, Part I also identifies the types of policies developed and invoked by courts and commentators in traditional normative analyses. This Part also explains the methodology employed in gathering the data. Parts II and III of the Article present the results of the study. Part II reports the frequencies with which courts in products liability decisions have invoked each type of policy, together with the frequencies with which each type of policy appears determinative when judges invoke more than one type in the same decision. Part II also reports on the extent to which reliance upon each type of policy has tended to benefit plaintiffs or defendants as a group. Part III focuses on the frequency of reliance upon public policy as a function of other variables. Such variables include jurisdiction (e.g., New York versus California); type and level of court (e.g., state versus federal, trial versus appellate); substantive issue to be decided (e.g., test for adequacy of warning versus standard for defective design); procedural disposition at trial (e.g., summary

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justifying the decision. This Article focuses on the latter process. See *infra* note 20 and accompanying text.

7. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS (1970); A.M. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS, 95-104 (1983); Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985); McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3 (1970); A. Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985). For a summary of this body of literature, see G. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763 (1985).

8. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); H.L.A. HART, THE CONCEPT OF LAW (1961); Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975); Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978).

9. *See, e.g.*, Cowan, *Jurisprudence in the Teaching of Torts*, 9 J. LEGAL EDUC. 444 (1957); Funk, *Interstitial Jurisprudence Illustrated in Teaching Criminal Law*, 27 J. LEGAL EDUC. 53 (1975).

judgment versus judgment on jury verdict); and nature of plaintiff's injury (e.g., personal injury versus property damage).

I. Theory and Methodology

A. What Is Public Policy? When May Judges Be Said to Rely upon It?

As employed in this analysis, "public policy" refers to one of two primary sources of justification upon which judges rely in deciding issues of law.[10] Public policies derive their potency from moral, economic, institutional, and other social considerations.[11] The alternative source of justification is precedent. A judge relies upon precedent by invoking another authoritative decisionmaker's prior declaration that a particular legal rule or standard is dispositive of the issue before the judge.[12] Precedent may take the form of legislation, administrative regulation, or prior court decision.[13] Precedent takes priority over policy in the sense that, at least in theory,[14] a court relies upon policy to guide its decision only when precedent fails to dispose of an issue of law.[15] Although some judges deny the

10. Courts also rely on what one commentator refers to as factual, interpretational, and critical reasons in reaching decisions. *See generally* Summers, *supra* note 8, at 725-26 (describing factual reasons as those that support findings of fact, interpretational reasons as those based on textual interpretations, and critical reasons as those that support the decision by criticizing another reason generally provided). Of course, it is possible that a judge might decide an issue of law by fiat, and give no justification whatsoever.

11. *See* H. STEINER, *supra* note 2, at 34-91; Summers, *supra* note 8, at 710 n.3 and accompanying text.

12. For treatments of the role of precedent, see Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989); Eisenhower, *Four Theories of Precedent and Its Role in Judicial Decisions*, 61 TEMP. L.Q. 871 (1988); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

13. More commonly, "precedent" refers only to prior judicial decisions. "Precedent can be defined as a binding rule that has been stated and acted upon by judges in individual decisions." Eisenhower, *supra* note 12, at 871. I am using the term more broadly and as synonymous with "authoritative reasons" in Summers, *supra* note 8.

14. Some have argued that underlying policy must always be considered in determining whether a precedent actually binds the court in a particular case. *See, e.g.*, Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Not infrequently, judges allude to policy even while declaring themselves bound by precedent. For present purposes a court is deemed to rely upon public policy whenever an opinion develops that policy approvingly in support of a decision, even when the opinion writer claims to be bound by controlling precedent.

15. *See, e.g.*, Conley v. Boyle Drug Co., 477 So. 2d 600, 607 (Fla. Dist. Ct. App. 1985) (The court stated that "the courts of appeal are bound to follow the case law set forth by the Florida Supreme Court and we have no authority to approve a new theory of liability. It is only within our power to state our reasons for advocating change . . . ."). The district court of appeal in *Conley* certified to the Florida Supreme Court the question of whether Florida recognized a plaintiff's cause of action against a manufacturer when the plaintiff admittedly could not establish that a particular defendant was responsible for the injury. The Florida Supreme Court created a new cause of action by answering this question affirmatively. Conley v. Boyle Drug Co., 570 So. 2d 275 (Fla. 1990). Of course, judges can almost always use policy, if they are so inclined, by distinguishing the prior decision on its facts. Indeed, policy plays an important role in determining the reach and scope of precedent. *See* H. STEINER, *supra* note 2; *see generally* Summers, *supra* note 8, at 730-35 (identifying the factors judges utilize to reach their decisions).

legitimacy of judicial reliance upon social policy as a guide to decision in the absence of precedent,[16] most courts and commentators recognize policy as an appropriate justification.[17] The public policies which this analysis examines include both instrumental and noninstrumental objectives.[18] Although one influential writer limits the term "policy" to instrumental justifications,[19] here the term applies equally to both varieties.

For purposes of this analysis, an opinion relies upon public policy when it explicitly asserts that the decision was influenced, at least in part, by that policy. Clearly, judges reach decisions for reasons not stated in their opinions; they may even purport to rely upon policy rationales that played no real part in their reaching of the decision.[20] But the data gathered in this study do not attempt to look beneath the surface of the written texts. Even one who denies a strong connection between justificatory reasoning and the actual process of decisionmaking should be interested in the process of justification for its own sake. After all, even if the judge who invokes policy to justify a decision actually does not use that policy to reach the decision, at least the judge thinks that those who read the opinion will accept the policy as valid and be persuaded by it. Therefore, this analysis takes judicial statements at face value; if the opinion says that a policy consideration influenced the decision, this analysis codes the decision as one relying upon public policy.

When an opinion mentions no justificatory reason that would be counted here as a policy reason, this analysis treats it as a decision reached without reliance upon public policy. Again, one can only speculate regarding whether unexpressed policy considerations actually affected the decision, but one can at least conclude that the writer of the opinion believed that explicit reliance upon policy was not necessary. Also in this analysis, when more than one judge

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16. *See, e.g.,* Dahl v. Bayerische Motoren Werke, 304 Or. 558, 567, 748 P.2d 77, 82 (1987) (stating that "[i]n [an earlier decision] we rejected an approach to tort liability by resort to a legislative style of policy-making, instead maintaining a judicial search for policy made by others or for the implications of existing principles"); Griggs v. Capitol Mach. Works, 690 S.W.2d 287, 293 (Tex. Ct. App. 1985) (stating that "[t]he liability [imposed by some courts] simply floats between earth and sky, buoyed perhaps by the salutary policy that one should have reparation for his injuries but disregarding the fundamental proposition that there is no pre-existing legal principle [supporting] such reparation").

17. *See, e.g.,* Lewis v. Timco, Inc., 716 F.2d 1425, 1432 (5th Cir. 1983) (stating that "[i]t is relevant to an analysis of how a rule allocates liability for accident losses resulting from use of a product to consider: (1) short-term and long-term cost; (2) amount of use of the product in the economy or 'activity;' and (3) cost of administering the rules of liability"); Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (stating that "[b]ecause the theory appellants urge has no support in precedent, the case presents a public policy choice, one with which legislatures, as well as courts, have struggled").

18. Instrumental objectives view the imposition of liability as a means of achieving ends outside itself. For example, liability is justified because it creates incentives for actors to behave more efficiently. Noninstrumental objectives view liability as an end in itself. For example, liability is justified because the actor has engaged in wrongful conduct deserving of punishment.

19. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977).

20. *See generally* Shapiro, *In Defense of Judicial Candor,* 100 HARV. L. REV. 731 (1987) (arguing for judicial candor in the explanation of rationales guiding decisionmaking).

writes an opinion in the same case, each opinion is counted separately. Thus, a single reported decision may contain two or more examples of judges purporting to rely upon public policy in reaching conclusions of law.[21]

B. The Major Categories of Public Policy Relied Upon in Products Liability Cases

Among the substantial majority of judges and commentators who believe that substantive policy norms can assist decisionmakers confronting legal choices in the absence of dispositive precedent,[22] three perspectives currently dominate: fairness/rightness norms,[23] economic efficiency/cost reduction norms,[24] and process/institutional norms.[25] Other policies are often articulated,[26] but these three are invoked most frequently. Each will be developed in the sections that follow.

Many of the discussions of public policy appearing in published products liability decisions consist of justifications for imposing, or refusing to impose, strict liability on the commercial distributors of defective products.[27] The following descriptions of the major public policy categories are couched in broader terms that relate to the objectives of tort law generally, including the objectives of theories other than strict liability. It will aid understanding, however, if one bears in mind the close affinity between *products* liability and *strict* liability.

1. Fairness/Rightness Norms

Fairness norms reflect the belief that law in general, and tort law in particular, should aim at enhancing noninstrumental fairness/rightness values which mediate between and among conflicting individual preferences. From this perspective, courts impose liability on actors not for the purpose of affecting future conduct but for the purpose of correcting past wrongs.[28] In the products liability context, one encounters several variations on this basic theme. First, some commentators justify liability on fairness grounds because a

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21. This study focuses on the analytical processes judges relying upon public policy use to fill in gaps, or to change the law. Thus, for present purposes, a dissenting opinion can represent this phenomenon just as readily as a majority opinion.

22. *See supra* notes 1, 8, 9, & 17.

23. *See* Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

24. *See* Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

25. *See* Henderson, *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. PITT. L. REV. 761 (1990).

26. *See infra* notes 74-78 and accompanying text.

27. *See supra* note 1.

28. *See* Fletcher, *supra* note 23, at 543-51.

defective product that causes harm disappoints the consumer's or user's justified expectations regarding safety.[29] A plaintiff who has paid value for the product has a right to insist that it not fail dangerously in its intended use. Producers typically try to communicate impressions of product infallibility that inspire consumer confidence.[30] This norm posits that the injured plaintiff has a right to claim compensation when that confidence proves to be misplaced.

Liability for defective products also has been justified on fairness/rightness grounds because in distributing such products the producer deliberately appropriates, for profit, the physical well-being of those who are injured by the product.[31] Under this view, the producer should pay because it distributed the product that caused the harm.[32] The producer does not know who will be injured, but it knows with certainty that some victims will suffer injury.[33] The producer may act reasonably in the sense that its conduct is justified economically,[34] but its deliberate decision to produce and distribute the product has condemned users and consumers to suffer harm.[35] The manufacturer, therefore, should be required to compensate the injured victims.[36]

Liability is justified also on fairness grounds because it forces those who benefit from a risky activity to pay for the harm inflicted.

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29. *See generally,* Hubbard, *Reasonable* Human *Expectations: A Normative Model for Imposing Strict Liability for Defective Products,* 29 MERCER L. REV. 465 (1978) (arguing that product liability injuries should be apportioned in accordance with the consumer's reasonable expectations); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment,* 60 VA. L. REV. 1109 (1974) (arguing that the process for determining liability from consumer products should focus principally upon the portrayal of the product to the consumer).

30. *See, e.g.,* Bastian v. Wausau Homes, Inc., 620 F. Supp. 947, 949 (N.D. Ill. 1985) (stating that "[t]he policy issues to be considered in imposing strict liability include . . . the invitations and solicitations of the manufacturer to purchase the product"); *see generally* Shapo, *supra* note 29, at 1129-31 (describing seller communications to the consumer).

31. *See, e.g.,* Ales-Peratis Foods Int'l v. American Can Co., 164 Cal. App. 3d 277, 289, 209 Cal. Rptr. 917, 924 (1985) (holding that "[t]he moral blame attaches to [the defendant] because it shipped obviously defective goods which . . . may have proved hazardous to the health of the ultimate consumers"); *see generally* Cowan, *supra* note 1, at 1087-92 (describing the appropriation theory and arguing that it constitutes a form of strict liability).

32. *See, e.g.,* Rivera v. Mahogony Corp., 145 Ill. App. 3d 213, 215-16, 494 N.E.2d 660, 662 (1986) (noting that "[c]ommercial lessors . . . have been held to be in the original chain of distribution . . . because they reaped a profit from placing the product into the stream of commerce").

33. In this respect the producer may be analogized to an actor who shoots into a crowd; although the shooter may not know who will be injured, he commits an intentional wrong against the victim. *See generally* W. PROSSER & P. KEETON, THE LAW OF TORTS § 8, at 35 (5th ed. 1984) (stating that intent encompasses both intended consequences and those that are substantially certain to follow from the actor's actions).

34. Even if an occasional defect-related accident occurs, the activity of producing and distributing the product may still be reasonable.

35. *See, e.g.,* LeBel, *Intent and Recklessness as Bases of Products Liability: One Step Back, Two Steps Forward,* 32 ALA. L. REV. 31, 67 (1980) (arguing that corporate weighing of costs and benefits of marketing harmful products currently does not take into account the costs to society).

36. The leading case for imposing liability on an actor for harm deliberately inflicted even if the actor is privileged to act is Vincent v. Lake Erie Transp. Co., 109 Minn. 456, 124 N.W. 221 (1910).

Liability causes the financial burdens of product-related accidents to be included in the prices of potentially harmful products, thereby shifting those burdens to those who use, consume, and thus directly benefit from, the products in question.[37] From this perspective, the producer is a conduit through which accident costs are shifted from injured persons who do not benefit directly from the products to those persons who do. When the accident victims are nonuser-nonconsumer bystanders, this principle of "those who benefit should pay" is strongest.[38] But it also applies to user/consumer victims who are not in a position to control or eliminate the relevant risks by changing modes of use and consumption.[39]

Yet another fairness/rightness norm justifies imposing liability in certain types of cases. When a producer misrepresents the risks associated with its products, or fails adequately to appraise the user/consumer of hidden risks, the producer may affront the victim's sense of personal dignity, and thus commit a wrongful act.[40] This norm proscribing affronts to dignity overlaps somewhat with the norm protecting reasonable expectations described earlier, but the two are distinguishable. For example, when a defendant inadvertently fails to warn of hidden risks resulting in harm to the plaintiff, it is easier to justify liability in terms of the disappointment of the plaintiff's expectations. When the plaintiff suffers harm because of

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37. *See, e.g.*, Schump v. Firestone Tire and Rubber Co., 44 Ohio St. 3d 148, 157, 541 N.E.2d 1040, 1049 (1989) (Sweeney, J., dissenting) (stating that " 'the law of strict liability is based upon the decision in policy that the loss which is caused by a defective product should be spread over . . . those who benefit from the product' " (quoting SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTIONER § 7.23, at 229-30 (1981))).

38. Bystanders may be said to benefit indirectly from the distribution of products in the sense that they benefit generally from an economy in which consumer goods are readily available. With respect to the product unit or product category that causes injury, bystander injuries represent negative externalities that should, in fairness, trigger rights to compensation. In Richman v. Charter Arms Corp., 571 F. Supp. 192, 203 (E.D. La. 1983), *modified*, 762 F.2d 1250 (5th Cir. 1985), the court articulated one justification for imposing liability on handgun manufacturers in these terms:

> [T]he most significant fact that the defendant ignores is that increased insurance costs can be passed on to consumers in the form of higher prices for handguns. The people who benefit most from marketing practices like the defendant's are handgun manufacturers and handgun purchasers. Innocent victims rarely, if ever, are beneficiaries.

39. One example of such a user and product is cosmetics. *See* Henderson, *supra* note 25, at 787-89. User and consumer victims presumably benefit from their use and consumption. When defects cause a few persons to suffer injury, however, the burdens on the few unfortunate victims far outweigh the concomitant benefits to those individuals. Requiring those users and consumers who have benefited without injury from product use and consumption to contribute toward compensating victims through incrementally higher prices seems only fair. This sense of fairness is reflected in the ancient proverb, "There, but for the grace of God, go I."

40. *See, e.g.*, Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330, 338 (5th Cir. 1984) (stating that " '[a]ny . . . product user has a right to decide whether to expose himself to the risk' " (quoting Borel v. Fibreboard Paper Prods., 493 F.2d 1076, 1106 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974))).

the defendant's fraudulent misrepresentation, liability is justified more easily on the basis of an affront to dignity. Both rationales apply in both cases, but the emphasis is different.

Two more noninstrumental, fairness-related norms remain to be identified. Judges sometimes explain their decisions on fairness grounds analogous to equal protection analysis in constitutional decisionmaking. When a suggested approach to liability would cause similarly situated claimants or defendants to be treated differently, courts tend to refrain from imposing such differential treatment.[41] Finally, some judges invoke the noninstrumental rationale of punishing wrongdoers, especially when justifying expansions of doctrine relating to punitive damages.[42] In contrast to the earlier described versions of fairness/rightness norms, which emphasize the plaintiff's right to be compensated, the punishment rationale emphasizes the defendant's obligation to pay for having injured others through wrongful conduct.

2. *Economic Efficiency Norms*

Economic efficiency norms reflect the belief that law does and should enhance essentially instrumental, allocative efficiency objectives. From an efficiency perspective, law helps competitive markets move resources to their highest uses without attempting to mediate between or among individual preferences.[43] Imposing liability for defective products increases utility by satisfying four major objectives: encouraging investment in product safety,[44] discouraging consumption of hazardous products,[45] reducing transaction costs,[46] and promoting loss spreading.[47]

Imposing liability promotes investment in product safety because

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41. *See, e.g.*, Magallanes v. Superior Court, 167 Cal. App. 3d 878, 889, 213 Cal. Rptr. 547, 554 (1985):

> If a plaintiff is permitted to seek punitive damages, in a case in which liability for compensatory damages is based solely on participation in the market, some suppliers who are not named as defendants, but who may have acted with malice in manufacturing and distributing DES, and one of which may have provided the specific substance ingested by plaintiff's mother, will fortuitously escape liability altogether. At the same time others, whose conduct was no more culpable, and who may have caused plaintiff no actual harm, but who have been named as defendants, will remain subject to the burden of punitive damages. This would be grossly unfair.

42. *See, e.g.*, Fischer v. Johns-Manville Corp., 193 N.J. Super. 113, 125, 472 A.2d 577, 584 (App. Div. 1984) (stating that "[b]oth punishment and deterrence are appropriate responses to a supplier of defective goods who has knowledge of the high degree of risk of grave harm to which they will subject the public"), *aff'd*, 103 N.J. 643, 512 A.2d 466 (1986).

43. *See generally* CALABRESI, *supra* note 7 (arguing for a tort theory based upon cost-spreading, risk-distribution, and cost-avoidance); Posner, *supra* note 24 (same).

44. *See, e.g.*, Armstrong v. Cione, 69 Haw. 176, 182, 738 P.2d 79, 83 (1987) (stating that "[a complete] bar [to recovery] would result in inefficient economic incentives to produce safe products").

45. *See* CALABRESI, *supra* note 7, at 68-75; McKean, *supra* note 7, at 41-42.

46. *See, e.g.*, Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110, 118 (La. 1986) (stating that "reducing the cost of administering accident cases" is one of four goals of strict products liability).

47. *See, e.g.*, Becker v. IRM Corp., 38 Cal. 3d 454, 466, 698 P.2d 116, 123, 213 Cal. Rptr. 213, 220 (1985) (stating that "[t]he paramount policy of the strict products liability

it creates the financial incentive for manufacturers to find more cost-effective ways to reduce or eliminate product risks.[48] This objective assumes that consumers do not know the relative levels of care achieved by various producers and that if consumers had this knowledge, comparatively safer products would enjoy a competitive advantage and the market would force producers to optimal care levels.

Liability also reduces the consumption of risky products by increasing their monetary prices and thereby disadvantaging them in the market.[49] This second efficiency objective assumes that consumers tend to underestimate the risks associated with various products.[50] Unless consumers are reminded of these risks by price increments reflecting manufacturers' liability insurance costs, they will overconsume relatively risky products. Lower consumption of risky products, however, will result in fewer accidents, thereby reducing accident costs.

A third efficiency objective traditionally considered relevant in determining liability standards is the reduction of transaction costs, which include the costs of operating the accident reparation system.[51] Holding other factors constant, liability standards that reduce these costs, by simplifying the proof necessary to establish liability, for example, are preferable to standards that are more costly to administer.

The final efficiency objective concerns reducing dislocation costs that occur when a single individual or business must bear the full accident loss. Whether borne by plaintiff or defendant, the cost of repairing the damage or replacing what has been lost may financially destroy the loss bearer. The additional social costs represented by the uncompensated victim who becomes a public charge, or by the manufacturer who goes into bankruptcy, also must be included as costs of accidents. These dislocation costs can be reduced by spreading accident losses among a large number of persons by means of insurance.[52] In general, manufacturers are considered

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rule remains the spreading throughout society of the cost of compensating otherwise defenseless victims").

48. One author refers to this as the "risk reduction" objective. *See* Owen, *Rethinking the Policies of Strict Products Liability,* 33 VAND. L. REV. 681, 711-13 (1980).

49. Professor (now Dean) Calabresi refers to this as the "market deterrence" objective. *See* CALABRESI, *supra* note 7, at 27. This objective is associated more closely with strict, rather than negligence-based, liability. Under strict liability, residual losses, which occur even when optimal care is taken, are also shifted to defendants thereby increasing the market deterrence effect.

50. *See, e.g.,* Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 83 (1960) (stating that "[u]nder modern conditions the ordinary layman, on responding to the importuning of colorful advertising, has neither the opportunity nor the capacity to inspect or to determine the fitness of an automobile for use").

51. *See* CALABRESI, *supra* note 7, at 225-26.

52. *See* Owen, *supra* note 48, at 703-07.

better able to obtain insurance than consumers, and are assumed to be able to pass on most, if not all, of the insurance costs to the consumer by raising the prices of products.[53]

Many judicial opinions invoking efficiency norms do so explicitly.[54] A categorization problem arises, however, when a policy discussion proceeds instrumentally but fails to mention explicitly that it seeks to achieve efficiency or to optimize resources allocation. In this study, when a court opinion speaks of "reducing accident costs" and "spreading accident costs" it is deemed to be invoking efficiency principles.[55] Similarly, if an opinion develops the notion that products liability helps to prevent accidents, this analysis treats such a rationale as efficiency-based. For our purposes, any instrumental justification that is not institutional in nature and does not explicitly identify some goal other than cost reduction—e.g., the promotion of some particular interest group—is treated as efficiency-based.

3. Process/Institutional Norms

In addition to the fairness and efficiency norms already identified, courts justify their choices of legal rules and liability standards by relying upon process, or institutional, considerations. These considerations relate to the workability of legal rules and standards. Four process norms must be satisfied if the common law is to provide coherent guides to lawyers, judges, and juries.[56] First, legal rules and standards must be sufficiently clear to be comprehended by reasonably intelligent addressees,[57] second, they must refer to facts that decisionmakers can verify reasonably accurately when applying the rules and standards,[58] third, they must refrain from requiring decisionmakers to accomplish the impossible,[59] and finally,

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53. *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) (stating that "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business").

54. *See, e.g.*, Richman v. Charter Arms Corp., 571 F. Supp. 192, 203-04 (E.D. La. 1983) (finding that "economic efficiency" requires strict liability), *modified*, 762 F.2d 1250 (5th Cir. 1985); Armstrong v. Cione, 69 Haw. 176, 182, 738 P.2d 79, 83 (1987) (referring to the court's "desire to create economic incentives").

55. *See, e.g.*, Wright v. Newman, 735 F.2d 1073, 1077 (8th Cir. 1984) (stating that "[t]he seller is in a position . . . to control the flow of dangerous products into the market. The seller is also generally better able *to bear and distribute the costs resulting from injury due to a defective product*") (emphasis added). The best clue that the court in *Wright* was using loss spreading as an efficiency rationale is that the court coupled loss spreading with risk reduction. Were the court to emphasize that loss shifting causes those who benefit to pay, we would consider this a fairness-based concern. *See supra* notes 37-38 and accompanying text. Interestingly, the court in *Wright* also included a "he who profits should pay" rationale in its policy discussion, 735 F.2d at 1077, and the decision was coded as having involved both efficiency and fairness policies.

56. *See generally* Henderson, *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982) (arguing that some substantive tort doctrines are best explained in terms of the constraints imposed by the processes by which liability rules are implemented).

57. *Id.* at 911-13.

58. *Id.* at 913-14.

59. *Id.* at 914-15; *see also infra* notes 65-66 and accompanying text.

they must present issues for decision that lend themselves to resolution through common law adjudication.[60]

Comprehensibility is threatened when rules and standards are excessively complex or vague.[61] An excessively complex rule tries to convey too much information; an excessively vague rule, too little. Both characteristics interfere with the capacity of rules and standards to communicate effectively.[62]

Verifiability requires that decisionmakers be able to determine the relevant facts in applying common law rules and standards in a variety of contexts. Generally speaking, common law rules and standards should avoid reliance upon factual circumstances that are difficult to verify, and that, for that reason, place one litigant at a significant evidentiary disadvantage.[63] Subjective states of mind, for example, are the sort of factual circumstances upon which common law rules ought not rely.[64]

The conformability norm urges that potential decisional standards should avoid requiring decisionmakers to accomplish the impossible. Judges are apt to invoke this norm when a proposed legal rule would require juries to allocate responsibilities among the litigants under circumstances in which the underlying factors to be compared are incomparable.[65] The norm also applies to primary

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60. Henderson, *supra* note 56, at 916-18.

61. Specificity in legal rules and standards is necessary for law to be manageable in court. *See infra* notes 67-70 and accompanying text.

62. *See, e.g.*, Venturelli v. Cincinnati, Inc., 850 F.2d 825, 828 (1st Cir. 1988) (stating that "[t]he risk in applying *all* legal change only prospectively is that of proliferating fine-spun, temporally based differences in the application of similar-sounding standards—the risk, in other words, of making the law too difficult to apply"); Montgomery Elevator Co. v. McCullough, 676 S.W.2d 776, 785 (Ky. 1984) (Stephenson, J., dissenting) (stating that "I cannot imagine anything more stupefying to a jury than the task of wrestling with the 'ordinarily prudent company' theory"); *see generally* L. FRIEDMAN, THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE 32-39 (1975).

63. *See, e.g.*, Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 523 (Fla. Dist. Ct. App. 1985) (stating that "[a]llowing recovery of risk of cancer damages . . . runs counter to the desirable goal that cases be decided on the best quality evidence available").

64. *See, e.g.*, National Ins. Underwriters v. Cessna Aircraft Corp., 522 So. 2d 53, 56 (Fla. Dist. Ct. App.) (Cowart, J., dissenting) (stating that "[allowing a detrimental reliance] exception will swallow the whole general rule [of retroactive application of new construction of statute] in that every plaintiff in a products liability case can, and will, assert that they 'relied on the existing statutory construction to their detriment' which statement is incapable of being rebutted"), *appeal dismissed*, 531 So. 2d 1352 (Fla. 1988).

65. *See* Anderson v. Somberg, 67 N.J. 291, 311, 338 A.2d 1, 11-12 (Mountain, J., dissenting), *cert. denied*, 423 U.S. 929 (1975):

> Note, first, the role the jury is being called upon to play. The judge will give to the jury two potentially contradictory instructions. First the jurors will be told to arrive at a verdict by a preponderance of the evidence, each defendant having the burden of exculpating himself. Then a further direction will be given that they *must* bring in a verdict against some one or more of the defendants. But suppose the members of the jury cannot agree that the evidence will sustain a verdict against *any* defendant. What then! Each juror has taken an oath—no small matter—to reach a verdict only "according to the evidence." What does he now do?

conduct, such as when the legal rules applicable to that conduct simultaneously proscribe both doing x and not doing x.[66]

The fourth process norm, manageability,[67] has two dimensions. First, legal rules and standards that require substantial judicial development of legislative facts threaten the manageability norm.[68] Second, if adjudication is to function as traditionally intended—that is, if the parties to the dispute are to have an opportunity to present proofs and arguments before an impartial tribunal that will reach a single, right result—then the applicable rules and standards of decision must be adequately specific. Minimum specificity is required for such rules and standards to separate the issues from one another and arrange them so that each may be addressed, in turn, in an essentially linear sequence.[69] In the absence of rules and standards sufficiently specific to make linear argumentation possible, problems of any complexity will present a tangle of conceptual elements, each of which is related to many, or all, of the others. Even if there are only two sides to the dispute, the interdependence of the issues will prevent the parties from working through linear chains of logic to outcomes that can be urged upon the court as a matter of right. In the end, the decisionmaker (judge or jury) will become a manager exercising discretion instead of a tribunal applying law to facts.[70]

In addition to the process/institutional norms already described, courts frequently determine the content of products liability law by

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66. *See, e.g.*, Dawson v. Chrysler Corp., 630 F.2d 950, 962 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981):

> In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards and to impose on automobile manufacturers conflicting requirements. It would be difficult for members of the industry to alter their design and production behavior in response to jury verdicts in such cases, because their response might well be at variance with what some other jury decides is a defective design.

67. *See, e.g.*, Henderson, *supra* note 25; Henderson, *The Role of the Judge in Tort Law: Why Creative Judging Won't Save the Products Liability System*, 11 HOFSTRA L. REV. 845 (1983); Henderson, *Expanding the Negligence Concept: Retreat From the Rule of Law*, 51 IND. L.J. 467 (1976); Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

68. *See, e.g.*, Fish v. Amsted Indus., 126 Wis. 2d 293, 310, 376 N.W.2d 820, 828-29 (1985) (stating that "[t]he [legislative fact] questions concerning the effect on the manufacturing business, the potential size and economic strength of successor corporations, the availability of commercial insurance . . . are all questions that we cannot answer"). *But see* Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1308 (1976) (arguing that courts may have advantages over legislatures in gathering and assessing information).

69. *See generally* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (describing the limitations of adjudicating complex, multidimensional disputes).

70. *See, e.g.*, Duran v. General Motors Corp., 101 N.M. 742, 747-48, 688 P.2d 779, 784-85 (Ct. App. 1983) (quoting Owens v. Allis-Chalmers Corp., 83 Mich. App. 74, 80, 268 N.W.2d 291, 294 (1978)):

> "Considering the nature of the design process, we find that adjudication must necessarily play a limited role in setting design standards. Without some extrajudicially established guidelines, the adjudicatory standard-setting process would resort to an assessment of conflicting expert testimony by those not possessed of the requisite expertise to adequately evaluate the interrelated and interdependent design choice criteria. Additionally, this evaluation would be made within an atmosphere susceptible to influence by

invoking an "institutional deference" rationale. In doing so, judges merge the four process norms into one bottom-line, "mega-norm"—that is, the new rule of law urged upon them is beyond the proper domain of the judiciary to fashion and implement.[71] When courts defer to either the executive or legislative branches of government, they frequently invoke separation-of-powers principles.[72] When courts refuse to contrive a rule of tort law to replace contract, they often emphasize the institutional norm of leaving contract law (often as embodied in the Uniform Commercial Code) free to function in its own legitimate domain.[73]

4. Other Norms Relied Upon by Judges Deciding Issues of Law

Judges invoke what might be termed "interpretational" norms when they struggle to determine the meaning of a statutory provision or a clause in a contract.[74] When a court concludes that it is bound by the "plain meaning" of a statute, for example, it defers to that meaning not for reasons of public policy, as that term is here being used, but for reasons of precedent.[75] To the extent that an interpretational norm like the so-called "plain meaning rule" helps the court to determine a statute's meaning, however, it deserves to be treated as a policy norm in its own right.[76]

Federal courts sitting in diversity in products liability cases frequently invoke what might be termed "federalism" norms. To the

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sympathy for an injured plaintiff, instead of an abstract concern for the desirable effect that public policy should play in governing a manufacturer's design choices. Inevitably, this would lead to varying standards from jury to jury or trial court to trial court."

71. *See, e.g.*, Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) (stating that "awarding damages . . . by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain"); Griggs v. Capitol Mach. Works Inc., 690 S.W.2d 287, 293 (Tex. Ct. App. 1985) (stating that "[w]e find in such decisions [adopting 'product line' doctrine] patently insufficient analysis and justification for the raw judicial legislation they illustrate so vividly").

72. *See, e.g.*, Hendrix v. Bell Helicopter Textron, Inc., 634 F. Supp. 1551, 1555 (N.D. Tex. 1986) (finding that the "[government contractor] defense is based on the recognition that courts are ill-equipped to second guess military judgments and is rooted in the separation of powers doctrine in the Constitution").

73. *See, e.g.*, East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 870-71 (1986) (stating that "[t]he minority view fails to account for the need to keep products liability and contract law in separate spheres"); Valley Farmers' Elevator v. Lindsay Bros., 380 N.W.2d 874, 877 (Minn. Ct. App. 1986) (finding that " 'tort law and the Uniform Commercial Code serve distinct purposes and neither will be permitted to preempt the other.' " (quoting S.J. Groves & Sons v. Aerospatiale Helicopter Corp., 374 N.W.2d 431, 433 (Minn. 1985))), *aff'd*, 398 N.W.2d 553 (Minn. 1987).

74. *See generally* Summers, *supra* note 8, at 726 (explaining the distinctive characteristics of interpretational reasons).

75. *See supra* notes 12-13 and accompanying text.

76. *See, e.g.*, Armstrong v. Cione, 69 Haw. 176, 180, 738 P.2d 79, 82 (1987) (finding that "[t]he plain meaning of the words of the statute itself indicates the legislature has not intended to reach this area of law").

extent that a federal court's *Erie*-educated guess regarding the content of state law in the absence of precedent is influenced explicitly by the court's unique role in our federal system, that consideration is a policy norm.[77] The same thing is true when a court undertakes an open-textured analysis to determine if federal safety regulations have preempted state law.[78] Because these federalism norms directly involve the institutional competence of courts to fashion appropriate rules or standards, this analysis treats them as process norms.

C. *Further Distinctions and Refinements*

1. *The "Policy Becomes Legal Standard" Phenomenon*

The concepts of precedent and policy can overlap. An existing legal rule, accepted by a judge as binding precedent, may incorporate a standard expressed in public policy terminology. For example, a widely adopted test for defective product design is whether a less risky alternative design would have been more efficient than the actual design.[79] In deciding whether the plaintiff has introduced sufficient evidence under such a standard, a judge may write an opinion that discusses at length the risks and utilities of the actual design and the proposed alternative, and may repeatedly invoke the concept of economic efficiency.[80] Notwithstanding the temptation to treat such a decision as based upon public policy,[81] this analysis treats the case as applying precedent.[82] When the court recites the reasons why the alternative design would or would not have been efficient (or rather, why a jury could or could not have so found) it is reciting factual reasons, not policy reasons as here defined.[83] Other

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77. *See, e.g.*, Plummer v. Abbott Laboratories, 568 F. Supp. 920, 927 (D.R.I. 1983):

> It is not for this court, sitting in diversity jurisdiction, to blaze a new trail where the footprints of the state courts point conspicuously in a contrary direction. In such a situation, a federal court must take law as it exists: not as it might conceivably be, some day; nor even as it should be.

78. *See, e.g.*, Wood v. General Motors Corp., 865 F.2d 395, 419 (1st Cir. 1988) (holding that congressional regulation of auto design preempts claim based on allegedly defective absence of passive, "air bag" restraints).

79. *See, e.g.*, Colter v. Barber-Greene Co., 403 Mass. 50, 53, 525 N.E.2d 1305, 1310 (1988) (quoting Back v. Wickes Corp., 375 Mass. 633, 642, 378 N.E.2d 964, 970 (1978) (quoting Barker v. Lull Eng'g Co., 20 Cal. 3d 413, 431, 573 P.2d 443, 455, 143 Cal. Rptr. 225, 237 (1978))):

> " 'In evaluating the adequacy of a product's design, the jury should consider, among other factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.' "

80. *See, e.g.*, Turner v. Machine Ice Co., 138 Ariz. 329, 674 P.2d 883 (Ct. App. 1983) (court repeatedly refers to its "risk/benefit analysis" test for defective design).

81. In recoding the cases that discussed policy, we culled the cases where data retrievers had mistaken applications of such standards to the facts of particular cases. *See infra* note 102 and accompanying text.

82. Typically in these cases, neither side challenges the appropriate legal standard, which is couched in efficiency terms. The court simply announces the standard and examines the facts of the case in light of the standard.

83. Resort to facts is a valid form of reasoning. Professor Summers refers to such

examples of such factual reasoning include considering whether a contractual term should be set aside for gross unfairness,[84] or whether the appellant received a fair trial.[85]

2. *Policy Reasons that Really Aren't—Or Almost Aren't—Policy Reasons*

Courts' opinions sometimes explicitly purport to rely upon policy when, in reality, they are asserting a conclusion by fiat. For example, suppose that a court that traditionally has required privity of contract as a prerequisite for an injured consumer to recover against a defendant product distributor were to abandon the privity requirement in a case in which no privity exists. Writing for a unanimous court, the chief justice explains: "An important policy reason supports the new rule allowing recovery against defendants not in privity with the plaintiff. Only by abandoning the privity requirement will plaintiffs not in privity be able to recover." Admittedly, this hypothetical example is extreme, but a few actual cases come close.[86] In any event, such circular reasoning is not considered policy reasoning in this analysis.

3. *When Courts in Products Cases Invoke Policy Reasoning, But Not in Connection with Products Liability Law*

There is a further source of confusion for anyone who would search for reliance upon public policy. Occasionally a judge in a products liability case invokes public policy norms in connection with an issue having no necessary link with the law of products liability. The issue may, for example, relate to rules of evidence or

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reasons as "factual reasons." *See* Summers, *supra* note 8, at 725. Such reasoning, however, is not normative.

84. *See, e.g.*, Comind, Companhia de Seguros v. Sikorsky Aircraft, 116 F.R.D. 397, 412 (D. Conn. 1987) (stating that "the Court's . . . task under the circumstances presented is to determine if the remedial provision [in the contract] was fair and reasonable").

85. *See, e.g.*, Kreager v. Blomstrom Oil Co., 379 N.W.2d 307, 312 (S.D. 1985) (Henderson, J., dissenting) (stating that "[s]imply put, [the requested instruction] should have been given to be fair" and "[t]rials are about fairness").

86. What all of the examples share is a striking circularity that betrays the desire to justify the decision with a reason that stands apart from the decision itself. *See, e.g.*, Jones v. Aero-Chem Corp., 680 F. Supp. 338, 340 (D. Mont. 1987) (stating that "[i]ndemnification [of middlemen by the manufacturer] fosters the desire of the public to place responsibility . . . on the manufacturer"), *rev'd on other grounds*, 921 F.2d 875 (9th Cir. 1990); Frazer v. A.F. Munsterman, Inc., 123 Ill. 2d 245, 265, 527 N.E.2d 1248, 1256 (1988) (stating that "[t]he policy basis for strict products liability [for defective products] is to almost insure a consumer's recovery in the case of a defective product"). One may wonder whether the arguable circularity of these statements would be eliminated if the opinions had merely stated "We decide thus-and-so because it is fair and efficient." The methodology employed in this study all but eliminated the problem of characterizing such terse statements as "policy reasoning." *See infra* notes 91-107 and accompanying text.

procedure that apply generally to civil litigation.[87] Because this analysis is concerned with the role of public policy in shaping the substantive law of products liability, such policy discussions have been excluded from the survey.[88]

4. The Limits of Categorization

Any attempt to arrange public policies into neatly defined categories is bound to fall short of perfection. Some proponents of fairness or efficiency rationales will claim that what this Article refers to as process norms are, in truth, adjuncts of their own normative perspectives. Under that view, legal rules and standards must be understandable and workable because it is only fair, or efficient, that they reflect those attributes. Moreover, it will be recalled that some of the fairness and efficiency rationales overlap. For example, loss spreading, an efficiency-based objective, can sometimes merge into the fairness rationale of "he who benefits should pay."[89] The methodological implications of these overlaps are considered in the next section. Notwithstanding these boundary problems, the three categories identified—fairness, efficiency, and process—are widely recognized and hold up adequately under pressure. Certainly in the area of products liability, they capture by far the greatest proportion of the attention courts and commentators have paid to what is here identified as public policy.[90]

D. Methodology

In connection with writing a products liability treatise, I resolved to read every products liability opinion published in recent years and to collect standardized information on each decision.[91] The database included only cases published biweekly by Commerce Clearing House (CCH) in its products liability case-reporting service.[92] Working simultaneously backward (through old CCH Reports) and forward (through new and current Reports), the database

87. *See, e.g.,* Ellis v. International Playtex, 745 F.2d 292 (4th Cir. 1984) (policy discussion related to evidentiary ruling not related to products litigation); Rostad v. On-Deck, Inc., 372 N.W.2d 717 (Minn.) (policy discussion related to issue of personal jurisdiction), *cert. denied,* 474 U.S. 1106 (1985).

88. For a description of how the decisions were coded and recoded, see *infra* notes 96-102 and accompanying text.

89. *See supra* notes 37-39 and accompanying text.

90. Only 12% of the decisions developing policy referred to policies other than the three major policies identified in the text. *See infra* Table 1.

91. I developed a 7-page, 46-field data retrieval form which was tested, altered, tested again, and finally put to use. The form is available from the author. For another application of the same products liability database to an empirical analysis, see Henderson and Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change,* 37 UCLA L. REV. 479 (1990).

92. Limiting the data in this manner was a matter of convenience. The task of reviewing thousands of reported decisions in tort cases to decide which decisions counted as "products liability decisions" was left to a panel of editors at CCH. The study relies upon the publisher's obvious market incentives to report those cases that would be deemed relevant by lawyers and scholars working in the products liability field. Looseleaf copies of the full text of each decision could be kept within easy reach. Factual summaries, but not full text, are included in the database.

grew until it contained 2517 summaries of reported judicial decisions.[93] The database contains most of the CCH-reported cases for the years 1984 through 1988, about seventy-five percent for the years 1983 and 1989, and about fifteen percent for 1990.[94] Although federal district court opinions are included in the survey, appellate opinions dominate.[95]

The data retrieval form includes such items as the complete procedural history of each case, the type of product, the type of defect, and the legal doctrines applied. The form asks the following questions about policies discussed in the decisions:

1. Does opinion mention or develop underlying policy? (circle as many as applicable).
   01 Yes (fairness/rightness/justice);
   02 Yes (efficiency/reduce costs/prevent accidents);
   03 Yes (both);[96]
   04 Yes (process—keep rules manageable, stable; role of jury; etc.);
   05 Yes—Other [write in space provided]; and
   06 No.
2. If yes to previous question, how fully developed? (circle one). The coded responses were:
   01 Developed at some length, powerful;
   02 Developed moderately;
   03 Mentioned in passing.

To render the results more reliable, I decided to reread and recode all of the decisions that data retrievers (myself and student researchers over a three-year period) originally had coded as developing policy either powerfully or moderately, a total of 430 decisions between 1983 and 1990.[97] An additional, supplemental form

93. Of the total, I retrieved data from 1107 decisions, or 44%. Student research assistants gathered the data from the rest.

94. One can roughly estimate the completeness of the CCH Reporter by comparing the number of opinions it reports to the number of opinions that Westlaw reports. For the years 1984 through 1988, CCH reported 2085 cases for an average of 417 per year. In 1986, the midpoint in this period, Westlaw identified and reported 388 decisions in its products liability topic number. Westlaw reported 447 decisions for 1986 in response to a search for "products liability" in all its topic headings.

95. Of the 2517 decisions collected, 343, or 13.6%, are federal district court decisions.

96. The insertion of the "both" response reflects the historical development of the form. All of the decisions reported in this Article were coded on the form described in the text.

97. The researchers did not reread or recode the "mentioned in passing" decisions. I sampled 30 of them, and not one developed policy to an extent that would allow it to be classified according to the fields on the new retrieval form. Also, I selected randomly and read 100 of the decisions originally coded "no policy" and found only two that arguably could have been included in our policy subset. It did not seem worthwhile to

was developed for that specific purpose.[98] In addition to retrieving some of the items originally gathered on the first, more general retrieval form,[99] the new supplemental form asked the researchers to indicate which opinions (majority, concurrence, or dissent) contained policy discussions, whether an amicus brief was filed, whether the decision involved the application of a state or federal constitutional provision, and whether the opinion expressed the policy discussion to any significant degree in language quoted from an outside source.[100] The new form also asked the data retrievers to identify which policies appeared to be controlling when an opinion developed more than one type.[101]

Student assistants reread and recoded all the decisions originally identified as developing policy either "moderately" or "powerfully." I reread and recoded all 183 decisions originally identified as "powerful development of policy" and compared my reactions with those of the students to these same cases. In addition, I selected randomly and reread fifty of the decisions originally coded "developed moderately," and compared my reactions with those of the students. The rate of discrepancy was low enough, and nonsystematic enough, to permit the conclusion that the students' reactions were consistent with my own.[102]

Of course, even if the judgments were reliable, in the sense that the student researchers arrived at judgments quite close to my own without detectable systematic bias, the question remains whether the benchmark criteria—my own judgments regarding when and what kind of policies were being developed—are valid. Responding to this residual question of validity, I considered the feasibility of establishing more specific and objective criteria with which to identify policy in the opinions. For example, the researchers might have searched for key words such as "policy," "fairness," "efficiency," and the like.[103] But after considering a number of more objective

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reread 2087 decisions to add approximately 40 cases to the policy database. *See also infra* note 108.

98. The 26-field form is available from the author.

99. Case name, citation, and CCH number were retrieved for each decision. In addition, the "type of policy" information was spelled out more elaborately on the supplemental form.

100. These aspects seemed to be the ones that might reveal interesting patterns of judicial policy development. Some proved interesting; others did not.

101. Each opinion was treated as a separate source of policy. The researchers looked for the policy or policies that the judge appeared to believe was controlling. Thus, even if the relevant policy discussion occurred in a dissent, it might nevertheless be deemed "controlling." I asked the data retrievers to read Henderson, *Coping With the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 931-39 (1981), and Henderson, *supra* note 56, at 904-11, to guide their analysis.

102. Although careful records of the discrepancies were not kept, I estimate that they occurred less than 10% of the time. They reflected no detectable systematic bias.

103. This is essentially what the researchers did in the case study of 6000 state supreme court decisions, *supra* note 2. The authors were looking for trends favoring a "new style" in judicial opinions from 1870 to 1970. Their criteria included factors such as length of opinion, citation of law reviews, and rate of concurrence and dissent.

approaches, and comparing the results they generated with the results generated by this approach, the study proceeded with the described methodology. The results are, in instances where meaningful comparisons can be made, consistent with the results reported by other researchers using methods different from and, in at least one instance, more objective than those described here.[104]

When the recoding was completed, the researchers determined that 374 of the 430 decisions developed policy to a measurable, significant degree. The other fifty-six decisions originally coded as relying upon policy fell prey to one or more of the coding errors identified earlier.[105] The new data was entered into a separate database. The "How fully developed?" field in the original database of 2517 decisions[106] was recoded to conform to the corresponding field in the new database.[107] The older database could then process inquiries correlating the frequency of "policy at least moderately developed" with any of the forty-odd variables in that database, and I could run inquiries on the new database correlating the variables included therein.

II. Frequency of Reliance as a Function of the Types of Policy Relied Upon

A. Frequencies with Which Different Types of Policies Were Developed and Relied Upon in the Opinions

Courts explicitly developed and relied upon public policy reasoning in fifteen percent of the products liability decisions contained in the database.[108] This Part examines the frequencies of judicial reliance upon the different types of policies identified in Part I. The supplemental retrieval form used to code the decisions required judgments regarding which types of policy were developed in each

104. *See supra* notes 2-4 and accompanying text.

105. See *supra* Part I, Section C for a discussion of the most common errors. Clearly the original coding errors were substantially more likely to have been errors of inclusion than errors of exclusion. That is, the original researchers were more likely to see policy when none was present than vice versa.

106. *See supra* notes 93-97 and accompanying text.

107. Thus, the 430 cases in the old database, originally coded as developing policy at least moderately, were recoded to conform to the new set identifying 374 of them as meeting that criterion.

108. Three hundred seventy-four decisions out of 2517 decisions equals 15%. As explained earlier, one decision might develop policy in two or more opinions. *See supra* note 21 and accompanying text. To check whether the 2087 decisions coded "no policy" in the original retrieval of data actually contained policy discussion, I reread a sample drawn randomly from the "no policy" decisions and found only a few that relied upon policy. *See supra* note 97. That is, the original researchers were more likely to see policy when none was present than vice versa. Even assuming that 2% of those decisions contain policy, that would only add approximately 40 policy decisions, which would only move the percentage relying upon policy from 15% to 16%. (374 plus 40 equals 414; 414 divided by 2517 equals 16%).

opinion and which policy type appeared to control the court's conclusions.[109] The discussion in this section focuses on the frequency with which each type of policy was developed in those decisions identified as containing one or more opinions developing public policy. Table 1, below, reports the frequency for each major policy type, expressed as a percentage of all decisions developing one or more types of policy.

Table 1
Frequencies with Which Products Liability Decisions Developed Different Types of Policy

Policy Type	No. of Decisions Developing Policy Type	Ratio of Number of Decisions Developing Policy Type to Number Developing Policy[110] (n=374)
Fairness/Rightness	219	.59
Process/Institutional	197	.53
Efficiency/Cost Reduction	189	.51
Others (punishment, human dignity, nonefficiency-based instrumental)	43	.12

The results reported in Table 1 introduce a theme that carries through subsequent discussions in this Part: of the three major types of policy rationales developed and relied upon by American courts to justify their decisions in products cases in the 1980s, fairness led in frequency while efficiency trailed. Based on the attention tort scholars have paid to efficiency rationales in the relevant literature, one might have expected just the opposite.[111] Admittedly, the frequencies in Table 1 are very similar. To the extent that one might have expected opinions to develop and rely upon efficiency reasoning most frequently rather than least frequently, however, the results reported in Table 1 are surprising.

The supplemental retrieval form also included the different subsets of, or variations on, each major policy theme. Table 2, below, reports the frequency for each variation, expressed as a percentage of those decisions developing the relevant major policy.

The most striking characteristic of fairness/rightness reasoning is

109. These judgments were made for each separate opinion in a decision. *See supra* note 21 and accompanying text. Thus, more than one policy may be recorded as controlling in a decision containing multiple opinions, even when each opinion develops and relies upon only a single policy.

110. The percentages do not add up to 100% because decisions frequently developed more than one policy.

111. *See supra* note 7 and accompanying text.

Table 2
Frequencies with Which Variations in Each Major Policy Appeared

Major Policy Type	Number of Decisions Developing Major Type	Variation	Number of Decisions Developing Variation	Ratio of Number of Decisions Developing Variation to Number Developing Major Type
Fairness/Rightness	219	general fairness rationale	160	.73
		those who benefit should pay	60	.27
		disappointment of expectation	32	.15
		deliberateness/causation	9	.04
		others	8	.04
Process/Institutional	197	institutional deference	93	.47
		manageability in court	49	.25
		verifiability/proof	27	.14
		statutory interpretation norms	27	.14
		comprehensibility/clarity	12	.06
		conformability	4	.02
Efficiency/Cost Reduction	189	promote loss spreading	118	.62
		encourage investment in safety	101	.53
		general efficiency rationale	54	.29
		reduce transaction costs	16	.09
		discourage consumption of risky product	13	.07
		others	8	.04

the extent to which generalized, bottom-line assertions of fairness dominated. Nearly three-quarters of the decisions containing opinions relying upon fairness included general assertions—specific fairness reasons appeared in less than half of the fairness-based decisions.[112] Typically, the opinion asserted that fairness considerations supported the position taken, and emphasized the factual circumstances triggering the plaintiff's right to recover rather than the constituent normative elements of the claim.[113] This recurring pattern of reliance upon vague assertions suggests that the judges grasped the concept of fairness intuitively, but found it somewhat difficult to explain analytically.

The relative frequency of what I call the "quotation phenomenon" indirectly supports this hypothesis. This phenomenon occurred whenever a policy discussion consisted entirely, or to a great extent, of verbatim quotations from earlier sources. The sources cited were typically prior judicial decisions. The opinions relying upon fairness/rightness norms quoted policy language from earlier sources more frequently than did opinions relying upon the other policy norms.[114] Not only did opinions rely on fairness/rightness rationales more often, but they were significantly more likely to do so by quoting previously published policy discussions. This tendency supports the hypothesis that judges found it comparatively more difficult to explain why fairness supported a given resolution of a legal issue. Quoting at length from a policy discussion in an earlier decision, especially one drafted by a prominent jurist in a leading case, was a useful way around the analytical difficulties. It also lent normative power to the court's analysis, and sometimes approached the power of binding precedent.[115]

When judges rely upon process reasoning, Table 2 shows that the institutional deference variation leads the others by a substantial

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112. One-hundred-eighteen decisions developed fairness only in general terms, representing almost 54% of the decisions that developed fairness.

113. *See, e.g.*, Borello v. United States Oil Co., 130 Wis. 2d 397, 408, 388 N.W.2d 140, 144 (1986) (The court concluded that " '[our] cases demonstrate that using the date of injury . . . as the benchmark for accrual of claims can yield extremely harsh results. . . . In the interest of justice and fundamental fairness, we adopt the discovery rule for all tort actions . . .' " (quoting Hansen v. A.H. Robins Co., 113 Wis. 2d 550, 556, 560, 335 N.W.2d 578, 581, 583 (1983))).

114. The quotation phenomenon occurred in 40% (88 out of 219) of decisions developing fairness, 37% (72 out of 197) of decisions developing process, and 23% (44 out of 189) of decisions developing efficiency.

115. It could be argued that if a court relies upon quoted policy from an earlier decision it is relying upon precedent rather than policy. I agree that if the court states that precedent controls, and quotes policy language from the prior case while routinely applying the established rule to the case before it, precedent, not policy, is at work. If the court quotes earlier-developed policy, however, in order to justify modifying, extending or clarifying the earlier decision, then the court is relying upon policy as that term is used here. A good example of such a use of policy is the *Borello* decision. The court applied an earlier precedent to a somewhat new fact situation after a lengthy opinion in which quotations from the earlier case were used to show the underlying policy. The best clue that the court is clarifying earlier law in light of fairness considerations comes near the end of the opinion when the court observes that "[w]e merely look at the cause of action in a new light that is more likely to produce a just result." 130 Wis. 2d at 421, 388 N.W.2d at 150.

margin.[116] The institutional deference subset of process reasoning is analogous to the generalized fairness rationale just discussed. Although judges may have recognized that they were being asked to take a position that would embarrass them institutionally, they might have been unable to explain compellingly why such embarrassment would occur. As a result, they tended to express, in general terms, limits on their power to make law and to apply it coherently. Doing this in the context of deferring to other institutions such as the legislature,[117] the executive,[118] or the marketplace[119] enhanced the normative power of their reasoning, accompanied as it often was with just the appropriate touch of judicial humility.[120]

The breakdown of efficiency reasoning reported in Table 2 shows that the catch-all category ("general efficiency rationale") trails, by a fairly wide margin, two more specific policies. Those policies are encouraging investment in safety and promoting loss spreading.[121] In contrast to the preceding discussions of fairness and process, opinion writers appeared more confident in their ability to explain why allocative efficiency principles did or did not support the adoption of the relevant legal positions urged upon them. Of the three major types of public policy, efficiency trails the other two significantly in the frequency with which opinions exhibited what I refer to as the "quotation phenomenon."[122] Although opinion writers relied upon efficiency reasoning somewhat less frequently than upon fairness and process, when they did rely on efficiency they tended to be more specific in their analysis and to use their own words.

One final aspect of the efficiency-related data is noteworthy. In less than seven percent of the decisions invoking efficiency norms

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116. The margin is even more substantial when one concedes the close relationship between "institutional deference" and "manageability in court," which is the next most frequently invoked process norm. It is but a short distance from "courts cannot handle this" to "let another institutional decisionmaker handle it."

117. *See, e.g.*, Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) (stating that "[t]he imposition of liability upon a manufacturer for harm it may not have caused . . . is an act more closely identified as a function assigned to the legislature"); *see also supra* note 16 and accompanying text.

118. *See supra* note 72 and accompanying text.

119. *See supra* note 73 and accompanying text.

120. *See, e.g.*, Adams v. Armstrong World Indus., 596 F. Supp. 1407, 1411 (D. Idaho 1984) (The court stated that "[p]resumably, the Idaho legislature is capable of weighing and balancing the cost to society of allowing or disallowing this type of lawsuit. Federal judges are not elected by the people and should avoid usurping the function of those who are so elected.").

121. "Promote loss spreading" occurred in 62% of the decisions developing efficiency rationales and "encourage investment in safety" in 53%. The general efficiency rationale trailed at 29%.

122. *See supra* notes 114-15 and accompanying text.

did judges invoke what commentators have referred to as the "market deterrence objective"[123]—the reduction in consumption of inherently hazardous products. In light of the considerable attention that norm has received in the scholarly literature on products liability,[124] one might have expected it to appear more frequently in the opinions.[125]

B. *Frequencies with Which Different Types of Policies Controlled Judicial Decisions on Issues of Law*

The preceding section reports the relative frequencies with which products liability opinions developed the different types and subtypes of policies. This section addresses the frequencies with which opinions indicated, explicitly or implicitly, that one or more major types of policy—fairness, process, and efficiency—controlled decisions on issues of law.[126] The data retrieval forms contained a separate field asking which of the major types of policy appeared to have controlled the decision. If the decision developed only one type of policy, then almost invariably that policy was deemed controlling.[127] If a decision developed more than one type of policy,[128] those policy types that appeared controlling with respect to some substantive issue were so recorded.

Usually, the judgment regarding which of two or more policies controlled was clear from the way the opinions were written. If a single opinion developed two or more policies, in most cases the judge either explicitly indicated which policy dominated or emphasized that both policies supported the decision. If the judge's position was ambiguous, the researchers recorded no policy as controlling.

Table 3, below, reports the frequencies with which each of the three major policies controlled the analyzed decisions. The frequencies are also expressed as ratios of all decisions relying upon public policy.

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123. *See, e.g.,* CALABRESI, *supra* note 7, at 27.

124. *See id.;* POLINSKY, *supra* note 7; R. POSNER, ECONOMIC ANALYSIS OF LAW 160-65 (3d ed. 1986); Shavell, *Strict Liability Versus Negligence,* 9 J. LEGAL STUD. 1 (1980).

125. My findings regarding the relative infrequency of judicial reliance upon efficiency rationales in products cases are consistent with those of two other writers in the field of contracts. *See* Farnsworth, *Developments in Contract Law During the 1980s: The Top Ten,* 41 CASE W. RES. L. REV. 203, 225-27 (1990); Harrison, *Trends and Traces: A Preliminary Evaluation of Economic Analysis in Contract Law,* 1988 ANN. SURV. AM. L. 73, 80.

126. We distinguished "controlling" from "prevailing, head-to-head." *See infra* Table 4.

127. The only time that a single policy, listed as developed, was not also listed as controlling was when an opinion developed a policy and then specifically rejected it without indicating which policy controlled. This occurred three times in the 374 decisions that developed policy.

128. This could occur in a single opinion or as a result of multiple opinions, each developing a single policy.

Table 3
Frequencies with Which Different Types of Policies Controlled in Products Liability Decisions

Policy Type	No. of Decisions in Which Policy Type Controlled	Ratio of Number of Decisions in Which Policy Type Controlled to All Decisions Developing Policy[129] (n = 374)
Fairness/Rightness	162	.43
Process/Institutional	154	.41
Efficiency/Cost Reduction	130	.35

Although a comparison between Table 1 and Table 3 does not reflect it because of the rounding off of the final ratios, the gap in relative frequencies between fairness and efficiency reasoning widens slightly from frequencies of development to frequencies of control.[130] Moving from development to control eliminates from consideration those policies that an opinion discussed but that did not appear to influence a decision on an issue of law. The numbers and ratios in Table 3 are smaller than in Table 1; that is, with respect to all three types of policy, more policies were discussed in opinions than ended up controlling decisions. But even as the numbers decreased for all three policies, the gap between fairness and efficiency widened both absolutely and relatively.[131]

C. *Frequencies with Which Different Types of Policies Prevailed When They Conflicted*

The best measure of the relative power of a particular type of policy is the frequency with which it prevailed when competing head-to-head with other policies. The most direct way to gauge these frequencies on our database was to focus on individual opinions in

129. These percentages add up to more than 100% because more than one type of policy can control in a single opinion, or in at least one opinion contained in a decision. *See supra* note 21 and accompanying text.

130. Tables 1 and 3 both report a .08 difference in ratios. The gap in ratios in Table 1 between fairness and efficiency, without rounding off, is .081. The gap in ratios in Table 3, without rounding off, is .085.

131. Absolutely, the gap in ratios widened from .081 to .085. *See supra* note 130. Measured relatively, the gap is even wider because the baseline numbers and ratios are lower. Thus, with respect to frequency of development, fairness was developed 18% more frequently than efficiency, and fairness controlled in the decision 24% more frequently.

which two or more policies were developed and one policy appeared to control. To ensure that the two or more developed policies were contained in the same opinion, one can eliminate from the "two or more developed, one controlled" population all decisions in which any policy was developed in a concurring or dissenting opinion.[132] The relative frequency with which a given policy ostensibly controlled the main or sole opinion is a good measure of its power relative to the other policies.

Table 4, below, reports two sets of ratios relevant to such an inquiry. The first set, which facilitates comparisons with similar data reported in previous tables, relates decisions in which each of the different policy types prevailed in comparison to all decisions developing policy. These ratios are quite low, given the constraints imposed in defining the relevant population of policy-driven decisions. The second set relates decisions in which each policy type prevailed in comparison to the total number of decisions in which two or more policies were developed and only one prevailed.[133]

Table 4
Frequencies with Which Different Types of Policies Prevailed in Head-to-Head Competition

Type of Policy	Number of Decisions	Ratio of Decisions in Which Policy Type Prevailed Head-to-Head to All Policy Decisions(n = 374)	Ratio of Decisions in Which Policy Type Prevailed Head-to-Head to all Head-to-Head Decisions[134] (n = 95)
Fairness/Rightness	43	.12	.45
Process/Institutional	34	.09	.36
Efficiency/Cost Reduction	18	.05	.19

Focusing on the first column of ratios, the gap between fairness and efficiency norms, measured in absolute terms, appears comparable to the gap reported in Table 1. Given the smaller numbers in Table 4, however, the relative significance of the gap between fairness and efficiency in Table 4 is greater than that in Table 1. As

132. The retrieval form contains a field asking the student researchers to indicate the types of opinions in which policy was developed. Unfortunately, the form does not ask "Which policy types in which types of opinions?" Deleting all decisions in which concurring or dissenting opinions appeared, however, eliminates the false counting problem identified in the text.

133. The right-hand column of ratios in Table 4 adds up to 100% because it lists percentages of all head-to-head decisions in which the indicated type of policy prevailed head-to-head, so that the numerator and denominator of the fraction are measured in the same units. The ratios in the left-hand column, like all ratios reported in Tables 1 through 3, do not add up to 100% because they are expressed as ratios in which the numerators are measured in different units than the denominators.

134. These add up to 100% because they are ratios of total head-to-head decisions.

revealed in the second column of ratios in Table 4, fairness prevails over other policies significantly more often than does efficiency. If the data reported in Table 4 accurately reflect the comparative persuasive force of the different kinds of policy reasoning, then the contest between fairness and efficiency is decidedly one-sided.

Putting the results reported in Tables 3 and 4 together, one may conclude that fairness reasoning operates as a more powerful norm than efficiency reasoning in influencing the decisions reached in the products liability cases included in the study. This outcome should give some pause to those who believe that efficiency norms dominate in this area of the law. Of course, efficiency norms might nevertheless be playing the role of an "invisible hand." Measured by what judges say in their published opinions, however, fairness norms, not efficiency norms, play the more decisive role.

D. Which Types of Policies Tended to Benefit Which Parties?

Prior to tabulating the data on this issue, this author would have expected economic efficiency reasoning to favor plaintiffs, process reasoning to favor defendants, and fairness to be more or less evenly balanced between the two. The rationale seemed straightforward enough. Although efficiency is generally associated with a conservative outlook, it has been linked historically with justifying judicial adoption of strict products liability.[135] Process norms, concerned with the limits on what courts can hope to accomplish, could be expected to serve as a brake on the expansion of liability. Fairness would be a neutral principle, blind to the overall tendencies in court decisionmaking. In any event, researchers coded the data to identify those decisions that made law favorable to either plaintiffs or defendants. Thus, it is possible to determine whether one kind of policy tended to favor one side or the other when that policy controlled in the decision.[136]

Unlike previous discussions in this Part which focused attention on disparities between fairness and efficiency norms, efficiency now appears to track the middle road. In decisions in which efficiency norms controlled, the law made by the court favored plaintiffs fifty-five percent of the time and defendants forty-five percent of the

135. *See supra* note 7.

136. The "which side benefited" question refers to the decision reached by the majority opinion in the case. The "which policy controlled" question refers to any opinion containing controlling policy, whether majority or otherwise. *See supra* notes 126-28 and accompanying text. Thus, a policy of one type might be developed in a dissent in a decision favoring plaintiffs as a class, and that policy would be credited with benefiting plaintiffs even though it was invoked in a dissent favoring defendants. Presumably, these errors are not systematic, and balance out over the run of hundreds of cases. *See supra* note 127 and accompanying text.

time.[137] These frequencies are too close to fifty-fifty to be very significant.[138] Fairness norms favored plaintiffs sixty-nine percent of the time and defendants only thirty-one percent of the time.[139] The numbers for process are almost the reverse—process norms favored plaintiffs only thirty-seven percent of the time while they favored defendants sixty-three percent of the time.[140] False counting may have occurred when the controlling policy appeared in a dissenting opinion in a decision that made law favoring plaintiffs or defendants. Factoring in that possibility, however, does not alter substantially the relevant percentages.[141]

What hypotheses may explain these results? The easier task is explaining why process reasoning favors defendants. Notwithstanding evidence that judicial attitudes have begun favoring products liability defendants in recent years,[142] a majority of petitions for legal change in products litigation come from plaintiffs.[143] To the extent that process norms argue against change and against expanding the role of courts in reviewing market decisions regarding product safety, those norms tend to hurt plaintiffs more than help them.

As for why fairness reasoning favored plaintiffs, explanations are more elusive. On its face, fairness appears a more neutral principle than process.[144] One might argue that the answer lies in the design of the retrieval form. Three of the five variations identified in the fairness field are couched in terms that, arguably, are loaded in

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137. Of 130 decisions in which efficiency norms controlled at least in part, 53 decisions made law favoring plaintiffs and 43 made law favoring defendants.

138. The probability of at least 53 heads in 96 tosses of a coin is fairly high (one-sided p equals .18). Thus, many researchers would conclude that the proportion of plaintiffs favored is not statistically significant.

139. Of 162 decisions in which fairness norms controlled at least in part, 91 made law favoring plaintiffs and 41 made law favoring defendants. The probability of at least 91 out of 132 tosses of a fair coin coming out heads (that is, favoring plaintiffs) is well under .0001; this result suggests statistical significance.

140. Of 154 decisions in which process norms controlled at least in part, 46 made law favoring plaintiffs and 79 made law favoring defendants. The odds of this result occurring by chance are .001, and suggest statistical significance.

141. When all decisions containing dissenting opinions are eliminated and the same inquiries run as before, efficiency favors plaintiffs 58% (47 out of 81) of the time (slightly higher); fairness favors plaintiffs 74% (71 out of 96) of the time (slightly higher); process favors plaintiffs 33% (34 out of 104) of the time (slightly lower). Thus, eliminating dissenting opinions had exactly the effect one should have predicted—it strengthened somewhat the tendencies observed with dissents counted in.

142. *See generally* Henderson & Eisenberg, *supra* note 91 (arguing that an empirical analysis of judicial opinions shows that courts are increasingly favoring defendants in products liability cases). This study was based, in part, on the same data used in the present study.

143. This was certainly the trend until recent years. *See id.* at 483-88. Notwithstanding the observed shift in judicial attitudes in products liability decisions, a significant portion of that shift represents courts beginning to deny plaintiffs' petitions for further expansions in liability.

144. The process of determining tort liability may be thought of as the process of deciding which of two persons, plaintiff or defendant, should bear a loss that has fallen on the plaintiff. The party who must bear the loss will be detrimentally affected, so that shifting the loss cannot be preferred on fairness grounds simply because the plaintiff has borne a loss. In the search for the appropriate loss bearer, one should be fair to both sides.

favor of plaintiffs—for example, "disappointment of consumer's expectations."[145] When one limits one's attention to decisions invoking only the general fairness norm, however, one finds that the percentage of decisions that favored plaintiffs was virtually the same as the percentage of decisions invoking all variations of fairness.[146] Perhaps the correlation between fairness reasoning and decisions benefiting plaintiffs is best explained historically. When products liability was in its infancy, courts relied upon fairness reasoning to support expansions of liability.[147] In the later period, from which the data were drawn, judges inclined to favor plaintiffs were able to draw upon rich, pro-plaintiff fairness rhetoric from the earlier era.[148]

III. Frequency of Judicial Reliance Upon Policy as a Function of Variables Other Than Policy Type

This Part focuses on the extent to which variables other than policy type appear to have affected the frequency of judicial reliance upon public policy. The following analysis presents three major sets of circumstances affecting the likelihood that a judge will rely upon public policy to justify a decision on a legal issue: first, the nature of the issue that the court is asked to decide, second, the nature of the court and the judges that comprise the court, and finally, the nature of the legal and cultural environment in which the decision is reached. The sections that follow address each of these circumstances, together with the relevant variables.

A. Frequency of Reliance as a Function of the Nature of the Issue Presented For Decision

This section examines the extent to which the frequency of reliance upon policy is affected by four variables, all relating to the nature of the issue presented for decision. The first three—the major area of law involved, the presence or absence of legal precedent, and the size of the stakes in the particular case—are substantive. The fourth—the mode of disposition at trial—is procedural.

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145. The same thing could be said for the efficiency rationales, which are often couched in terms that justify the imposition of strict liability. *See supra* text accompanying note 27 and *supra* note 1.

146. Seventy-one percent (48 out of 68) of the decisions invoking only the general fairness norm favored plaintiffs, compared with 69% (91 out of 132) of all fairness-invoking decisions.

147. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 384, 161 A.2d 69, 83 (1960) (The court stated that "[t]he obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.' " (quoting Mazetti v. Armour & Co., 75 Wash. 622, 627, 135 P. 633, 635 (1913))).

148. *See supra* notes 114-15 and accompanying text.

1. *Frequency of Reliance as a Function of the Major Area of Law Involved*

The most appropriate place to begin testing for influential variables other than policy type is by asking whether the findings in this study, especially the findings regarding frequencies of reliance upon policy in general rather than on specific types of policy,[149] are relevant to other areas of the law. Does products liability present a sufficiently generalizable case with regard to reliance upon policy, so that the potentially transferrable results derived from this study would be likely to recur in other legal areas? Nothing short of a full examination of other areas would permit one to answer this question confidently. A comparison with a different study discussing judicial reliance upon public policy may elucidate the matter, however. Twenty years ago, one researcher reported that from a sample of 300 judicial decisions drawn equally from three different jurisdictions, sixty-five decisions, or twenty-two percent, developed policy to some measurable degree.[150] The decisions, two-thirds of which were from federal courts of appeals, covered all subject matter areas, including administrative law and constitutional law.[151] As reported earlier, 374 of the 2514 decisions examined in the current study, or approximately fifteen percent, contained opinions that developed policy at least moderately.[152]

In comparing the frequencies of reliance in both studies, several observations are in order. Perhaps most important is that the earlier study characterized fifty-four of the sixty-five policy-oriented decisions as reflecting a "grand style" rather than outright reliance upon social policy.[153] The study defined the term "grand style" to include reliance upon policy, but a decision could invoke "grand style" without invoking public policy.[154] Thus, the overall figure of twenty-two percent probably overstates reliance upon policy compared with the fifteen percent rate reported in the current study.[155] Also, the samples of decisions in the earlier study, especially those

149. Obviously, some of the findings in this study have no direct relevance to other subject matter areas. The variable relating to the severity of the plaintiff's injury (including death and severe personal injury) must be recast in contracts or property cases. But other variables, such as overall frequencies of reliance, procedural disposition at trial, and type of court could be examined in other areas without modification.

150. *See* Daynard, *supra* note 2, at 924. These figures represent a compilation of three classifications of policy development: 1) the "grand style" method; 2) social policy derived; and 3) social policy asserted. For an explanation of these classifications, see *id.* at 921-23.

151. *See id.* at 920 n.2, 925 n.18.

152. *See supra* notes 105-07 and accompanying text.

153. *See* Daynard, *supra* note 2, at 924. The "grand style" is a method of judicial decisionmaking in which the court stresses that its decision is consistent with earlier authorities, but admits that those authorities are merely persuasive and indicative of the trend in the law. *Id.* at 921-22.

154. *See id.* at 922.

155. Professor Daynard's recollection is that some of the "grand style" decisions probably would not qualify as "policy" decisions as here defined.

from the federal courts of appeals, contained a significant proportion of "public law" cases, including some focusing mainly on constitutional law.[156] If one assumes that those cases were more likely to prompt courts to rely upon policy,[157] then the reliance rate reported in the earlier study does not differ substantially from the rate of reliance reported here. Finally, the instant study may slightly understate the overall frequency of reliance.[158] To investigate the question of how unique products liability cases may be in this regard, the student researchers read 150 contracts and 150 nonproducts tort cases drawn at random from the years 1983-1990, and then recorded the frequencies with which judges explicitly relied upon public policy.[159] The students discovered policy discussions in fourteen percent of the nonproducts tort opinions and in seventeen percent of the contracts opinions.[160]

Although one may rationalize away the differences in frequencies among these samples, the frequencies are close enough to let the results speak for themselves.[161] The current study of products liability decisions obviously has some relevance to other areas, especially the overall frequencies of reliance upon policy in different areas of the common law; just how much relevance these data do not reveal.

2. *Frequency of Reliance as a Function of the Presence or Absence of Precedent*

One might expect judicial opinions to rely upon public policy in direct proportion to the lack of dispositive precedent on the issue of law before the court.[162] The study offers several ways of confirming this hypothesis. The original retrieval form required the researchers to characterize the decisions in terms of their decisiveness as sources of law. Table 5, below, reports the frequencies of reliance upon policy for each of the five responses suggested on the form.

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156. *See supra* note 151 and accompanying text.

157. Forty-nine decisions in the database addressed constitutional issues. Of these, 36, or 74%, developed policy in their opinions.

158. *See supra* note 108.

159. They did not fill out forms. They merely read the decisions and recorded whether or not they relied upon policy rationales. The same students who did the recoding of products decisions read the contracts and nonproducts tort decisions, cross-checking one another's conclusions. I am confident that no systematic coding errors occurred.

160. Twenty-six of the 150 contracts cases relied upon policy; 20 of the 150 nonproducts tort cases did so.

161. The contracts sample may surprise some readers, because contracts is more formal than torts/products liability. I hypothesize that judges writing contracts law opinions treat as policy those issues previously described as "policy becomes legal standard." *See supra* notes 79-85 and accompanying text.

162. *See supra* notes 14-15 and accompanying text.

Table 5
Frequencies of Reliance as a Function of Decisiveness of Decision as Source of Law

Characterization of Decision in Data Retrieval Form	Total No. of Decisions	Number Relying upon Policy	Ratio of Number Relying upon Policy to Total
Especially important as source of new law	107	43	.40
Breaks new ground	352	96	.27
Considers and rejects change	267	51	.19
Invokes precedent routinely	269	24	.09
Decision turns on sufficiency of proof	853	51	.06

The results reported in Table 5 support the hypothesis that opinion writers tended to rely upon policy in direct proportion to the extent to which they engaged in making new law. Of course, the results in Table 5 reflect, to some extent, the fact that proportionally more decisions that were important sources of new law or that broke new ground were reached by highest appellate courts. These courts tended to invoke policy more frequently whether or not they were breaking new ground.[163] Even considering the effects of that variable and others, however, the hypothesis here tested holds up.[164]

The other way to test the correlation between reliance upon policy and making new law is by subject matter. For example, one familiar with products liability developments in recent years would expect relatively less policy to be developed in decisions involving manufacturing defects,[165] somewhat more in cases involving failures to warn,[166] more still in cases involving product designs,[167] even more in an area in controversy such as punitive damages,[168] and

163. For the frequency with which high courts rely upon policy generally, see *infra* note 187 and accompanying text. Even when decisions breaking new ground are excluded, high courts rely upon policy 23% (96 out of 420) of the time.

164. For example, in decisions that broke new ground in intermediate state courts of appeals, 27% (46 out of 171) relied upon policy, virtually the same figure reported in Table 5 for all courts.

165. The core legal issues regarding defectiveness, causation and the like have been settled for many years. Moreover, most of the controversial peripheral issues such as punitive damages, group liability, and successor corporation liability are unlikely to arise in manufacturing defect cases.

166. The rules governing liability are relatively settled in warnings cases.

167. Design cases were more problematic in the 1960s and 1970s, but still contribute their share of controversy. *See* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1565-73 (1973); *see generally* Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of An Emerging Consensus*, 63 MINN. L. REV. 773 (1979) (discussing the failure of the courts to adopt a uniform approach to determining liability for defective design).

168. *See, e.g.*, Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) ($6,200,000 in

most in an area experiencing significant shifts in direction over the relevant time period, such as successor corporation liability.[169] If these characterizations are accurate, the frequencies of reliance in each of these subject matter categories support the hypothesis that courts in the study relied upon public policy in proportion to the degree to which they considered making new law.[170]

3. *Frequency of Reliance as a Function of the Nature and Severity of the Plaintiff's Injury*

One would assume that severity of injury should not affect the frequency with which courts rely upon policy in their published opinions. Triers of fact may be affected by the severity of plaintiff's injury, even with respect to the question of liability,[171] but this should not be true of declarers of law, at least if one assumes that no substantive areas involving new legal developments correlate with the severity of injury.[172] Surprisingly, the severity of injury correlates fairly strongly with the frequency with which judges in our study relied upon policy.[173] Searching for an explanation, one discovers an equally strong correlation between the relative severity of plaintiff's injury and the tendency of judges to reach decisions that make new law.[174] The data do not reveal or even suggest underlying reasons why that should be so.[175] It may be that judges as well as juries are influenced psychologically by the severity of plaintiff's

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punitive damages). *See generally* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982) (examining the problems of assessing punitive damages in products liability cases).

169. *See, e.g.*, Ray v. Alad Corp., 19 Cal. 3d 22, 560 P.2d 3, 136 Cal. Rptr. 574 (1977) (leading case). *See generally* Roe, *Mergers, Acquisitions, and Tort: A Comment on the Problem of Successor Corporation Liability*, 70 VA. L. REV. 1559 (1984) (discussing the difficulty that judicial rules of successor liability have in achieving the goals of compensation and asset transferability).

170. Courts relied upon policy with the following frequencies in each of the subject matter areas identified in the text: manufacturing defects, 6% (12 out of 211); failure to warn, 11% (61 out of 582); defective design, 13% (83 out of 626); punitive damages, 17% (17 out of 102); and successor corporation liability, 33% (15 out of 46).

171. *See generally* A. CHIN & M. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 50-52 (1985).

172. One possibility might be that death, which is listed as the most severe injury, would trigger wrongful death claims which would raise policy issues under wrongful death statutes. The issues under wrongful death statutes, however, involve policy discussions at a lower than normal frequency.

173. These frequencies of reliance are observed for the following injury categories: death, 16% (54 out of 333); personal injury severe, 13% (109 out of 834); personal injury not severe, 6% (7 out of 108); and property damage, 5% (6 out of 117). The most significant discrepancy, which cannot be explained in terms of any other third variable, is that between severe and not severe personal injury.

174. In cases involving death, courts made new law (either break new ground or seriously consider and reject changes in the law) 34% (113 out of 333) of the time. In cases involving severe personal injury, they made new law 26% (215 out of 834) of the time. The overall rate for making new law was 25% (619 out of 2517) of the time.

175. One might hypothesize that the higher the stakes in a case, the more likely the

injury, and are thus moved to explain their conclusions of law relatively more thoughtfully and persuasively in cases involving severe injury.

4. Frequency of Reliance as a Function of the Procedural Disposition at Trial

One would expect a strong correlation between the procedural disposition at the trial court level and the use of policy by writers of judicial opinions. Beginning with trial court dismissals of complaints and ending with judgments entered after bench trials, the level of judicial lawmaking, and thus the level of explicit reliance upon public policy, should decrease substantially.[176] Table 6, below, shows the frequencies with which opinions relied upon policy in decisions making or reviewing the relevant procedural dispositions at trial.

Table 6
Frequencies of Reliance as a Function of Procedural Disposition at Trial

Procedural Disposition at Trial	Total No. of Decisions	Number Relying upon Policy	Ratio of Number Relying upon Policy to Total Decisions
Dismissal of Complaint	153	31	.20
Summary Judgment	778	121	.16
Directed Verdict	149	20	.13
Judgment After Jury Trial	863	100	.12
Judgment After Bench Trial	101	10	.10

Decisions based upon directed verdicts and judgments after trial may contain lower-than-average frequencies because in these situations the judges were more likely to have been reviewing the sufficiency of facts rather than judging the correctness of statements of law.[177]

If the procedural disposition at trial appears to have affected the frequency of reliance upon policy, might the procedural disposition on appeal have done the same thing? For example, might appellate courts have relied upon policy more often when reversing than when affirming outcomes at trial? Testing that hypothesis against the data reveals no significant correlation between use of policy and

parties would be to appeal to the highest court, and thus the more likely the court to rely upon policy. Controlling for this possibility, however, did not affect the results.

176. Attacks on the sufficiency of a complaint aim directly at the plaintiff's legal theory, and thus are more likely to raise issues of law than are attacks upon the sufficiency of the plaintiff's proof. Attacks on judgments entered after trial are more likely to involve sufficiency-of-proof issues.

177. *See supra* Table 5, "sufficiency of proof" term.

disposition on appeal.[178]

B. Frequency of Reliance Upon Policy as a Function of the Status of the Decisionmaker

The researchers did not gather data on the backgrounds of individual judges, and therefore this study cannot correlate reliance upon policy with personal attributes of the decisionmakers.[179] The researchers, however, did gather data on the institutional characteristics of the courts, such as state versus federal, trial versus appellate, and intermediate versus highest court of appeals. The sections that follow examine each of these characteristics. Also presented are the frequencies with which decisions that included concurring, dissenting, and per curiam opinions discussed policy, and the corresponding frequencies for cases decided en banc. Because the rates at which judges on a court concur, dissent, and the like reflect the collective personality of the court, examination of those variables is included in this section.

1. Frequency of Reliance as a Function of Whether Court Was State or Federal

Federal judges sitting in diversity and applying state law might be expected to rely upon policy in their decisions less frequently than their state court counterparts. Bound under *Erie* to follow state precedent, they might be thought less willing than state courts to engage in the sorts of judicial lawmaking that prompt discussions of public policy.[180] Alternatively, federal judges might be expected to talk policy more frequently. They may be considered a more sophisticated population of opinion writers, accustomed to decisionmaking in the fast-track, public law environment of the federal courts. Testing against the data, one finds that federal courts of appeals relied upon policy in products liability decisions slightly less frequently than did state appellate courts.[181] This difference in

178. The frequency of reliance upon policy varied little over the range of dispositions on appeal, with a slightly greater tendency for courts to talk policy when the disposition was relatively complicated, as in "affirmed in part, reversed in part, remanded in part." The one exception was when a state court answered a certified question. As might be expected, the frequency of reliance upon policy in this situation was higher—18% (11 out of 61).

179. This is a variable frequently emphasized in empirical work on judicial decisionmaking. *See* Daynard, *supra* note 2. *See also* Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966) (discussing trends in judicial decisionmaking as a function of the personal and social values influencing the judge).

180. On the other hand, when a federal court refuses to adopt a rule it prefers on the merits explicitly because it is bound by state law, the decision is likely to be coded as relying upon process reasoning. *See supra* notes 77-78 and accompanying text.

181. State courts of appeals relied upon policy 16% (272 out of 1705) of the time. Federal courts relied upon policy 13% (65 out of 486) of the time.

frequency is too small to lend much support to the "*Erie* deference" theory.

2. *Frequency of Reliance as a Function of Whether Court Was Trial or Appellate*

Because appellate courts address only issues of law, one might expect trial judges to rely upon policy significantly less frequently than appellate judges. State trial courts almost never publish opinions, so the only useful comparison available here is between federal district courts and federal courts of appeals.[182] Testing this hypothesis against the data, one finds no substantial difference in the frequencies with which the two types of federal courts relied upon policy in their published decisions.[183] One explanation of this result may be that federal district judges tend to write and publish products liability opinions only when important issues of law are presented.[184] Thus, the sample examined—federal district court opinions—may be biased, undercutting attempts to extend the results to trial courts generally.

3. *Frequency of Reliance as a Function of Whether Court Was Intermediate or Highest Court of Appeals*

Even if the differences in frequency of reliance upon policy between state versus federal and trial versus appellate courts are relatively unimportant, one would expect a substantial difference when comparing intermediate and highest state court decisions.[185] Given the control that many highest state courts exercise over their agendas,[186] highest courts should make new law, and thus invoke policy, substantially more frequently than intermediate courts of appeals. Testing this hypothesis against the data, one finds, at last, one's intuition confirmed. Highest courts of appeals relied upon policy almost two and one-half times more frequently than did intermediate courts of appeals.[187]

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182. This study neutralizes the "state vs. federal" aspect by comparing only federal decisions.

183. Federal district courts relied upon policy 12.8% (44 out of 343) of the time; federal courts of appeals, 13.4% (65 out of 486) of the time.

184. To some extent, of course, federal courts of appeals decide whether or not to publish their opinions. But district courts exercise this power more frequently. This discretion over when to write opinions functions in the context of this study in a manner similar to the certiorari power exercised by state high courts. *See infra* note 186.

185. Intermediate state courts are constrained by what might be called the institutional "pecking order," which prevents them from changing the law when the high court has spoken. *See supra* note 15.

186. *See generally* Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970,* 30 STAN. L. REV. 121, 128-32 (1977) (measuring the increased selectivity state supreme courts have over their agendas); Note, *Courting Reversal: The Supervisory Role of State Supreme Courts,* 87 YALE L.J. 1191, 1200-01 (1978) (arguing that a state supreme court's discretion to screen cases for review is a significant factor in the reversal rate of the court).

187. Intermediate state courts relied upon policy 11% (129 out of 1162) of the time; high courts, 26% (143 out of 543) of the time.

4. Frequency of Reliance as a Function of the Type of Opinions Filed

It would be reasonable to expect that the filing of concurring and dissenting opinions would increase the likelihood that one or more opinions in a published decision would rely upon public policy considerations. Not only would such opinions themselves be more likely to refer to policy, but their mere presence would probably spur majority opinion writers to do likewise.[188] Moreover, en banc decisions would be more likely to rely upon policy.[189] Conversely, one would expect public policy to play a small role in per curiam opinions.[190] The data support all three of these hypotheses. Frequencies of reliance upon policy in decisions were substantially greater when dissenting or concurring opinions were filed.[191] Reliance upon policy was also greater in en banc decisions.[192] Policy played almost no role at all in per curiam opinions.[193]

Admittedly, if several opinions are filed in the same case, the odds of at least one of them containing a policy discussion increase, even if the rate of policy discussion on a per opinion basis remains constant. To some extent the database permits one to control for this possibility. First, the frequency with which concurring and dissenting opinions relied upon policy was substantially greater than the frequency of reliance in majority opinions.[194] Second, the frequency of reliance upon policy in majority opinions was substantially higher in cases in which concurring or dissenting opinions were filed than in cases in which only a majority opinion was filed.[195]

The manner in which the data were collected may lead to a degree of double counting, because more than one opinion frequently appears and each opinion was treated as a separate source of policy.[196]

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188. The intuition here is that the writer of the majority opinion would feel constrained to explain her position if one or more of her colleagues publicly announced that the position is unsound.

189. En banc decisions usually address issues of particular significance involving novel issues of law, suggesting that policy will be of greater relevance to the decision.

190. If this study revealed more than a trivial frequency, my methodology would have been suspect because everyone "knows" that per curiam opinions "never" get into policy discussions.

191. For decisions containing one or more dissenting opinions, the frequency of reliance upon policy in at least one opinion in the case was 35% (93 out of 267); for decisions with one or more concurring opinions, it was also 35% (28 out of 79).

192. Reliance upon policy occurred in 37% (6 out of 16) of the en banc decisions in the database.

193. The frequency with which per curiam opinions relied upon policy was 3% (3 out of 113).

194. The overall frequency of reliance upon policy in majority opinions was 13% (339 out of 2517); the frequency in concurring opinions, 21.5% (17 out of 79); the frequency in dissenting opinions, 21.3% (57 out of 267).

195. The overall frequency of reliance upon policy in majority opinions was 13.4% (339 out of 2517); the frequency when only a majority opinion was filed was 12.1% (243 out of 2005).

196. *See supra* notes 21 & 136.

For example, in decisions that contained important concurring opinions, the frequency of policy development may have increased, partly because a powerful dissenting opinion in the same decision, already counted in the tally of the effects of dissenting opinions, actually invoked the policy. Controlling for this double counting effect, however, does not change the results.

C. *Frequency of Reliance Upon Policy as a Function of the Legal/Cultural Environment Surrounding the Court*

A number of elements comprising the legal/cultural environment surrounding a court might affect the court's recognition of policy as a legitimate source of justification for its decisions. For example, if the court system in a jurisdiction has a strong tradition of relying upon policy, one could expect to see that tradition reflected in the products liability decisions in this study. If lawyers arguing legal issues in a given state traditionally rely upon policy rationales, that tendency could be expected to reinforce the judges' own inclinations to so rely. Unfortunately, the data do not support testing the effects of all these environmental variables in the present study. Some effects, however, may be tested. One should begin by considering which jurisdictions relied upon policy in their products liability decisions over the relevant time period. Table 7, below, shows the frequencies of reliance, arranged in descending order, for jurisdictions with thirty or more state court decisions in the database. It also shows the frequencies for federal courts in jurisdictions that contributed fifteen or more federal court decisions.

Table 7
Frequency of Reliance as a Function of Jurisdiction

Jurisdiction (30 or more state decisions)[197]	Number of State Court Decisions	No. Relying upon Policy	Ratio of Policy Decisions to Total	No. Federal Court Decisions (15 or more)	No. Relying upon Policy	Ratio of Policy Decisions to Total
New Jersey	41	17	.41	28	7	.25
California	98	31	.32	15	5	.33
Washington	44	10	.23			
Pennsylvania	72	15	.21	74	6	.08
Alabama	42	7	.17			
Michigan	74	11	.15	22	5	.23
Florida	91	13	.14	29	5	.17
Arizona	36	5	.14			
Illinois	144	19	.13	29	4	.14
New York	126	15	.12	23	5	.22
Minnesota	61	7	.12			
Missouri	53	6	.11	33	1	.03
District of Columbia	28	3	.11			
Colorado	30	3	.10	20	1	.05
Indiana	43	4	.09	28	3	.11
Georgia	46	4	.09	21	0	.00
Texas	65	5	.08	58	7	.12
Massachusetts	47	3	.06	41	7	.17
Louisiana	115	4	.04	59	7	.12
Tennessee	49	1	.02	17	1	.06

197. Only 28 decisions are reported for the District of Columbia.

As Table 7 suggests, the legal/cultural environment in which a court functioned made a substantial difference in judges' willingness to rely upon public policy to justify their decisions. Indeed, the variance borders on astounding: New Jersey state courts relied upon policy more than twenty times as frequently as did state courts in Tennessee. If Table 7 represented a snapshot recording an instant in time, one might hypothesize that differences in personalities of individual judges largely explained this substantial variance. The study, however, spans an eight-year period. Moreover, the data reveal no noteworthy year-by-year trends in reliance upon policy.[198] Thus, the patterns revealed in Table 7 more probably reflect cultural and environmental variables than individual judicial temperaments.

We can test the foregoing hypothesis by comparing the results reported here with the results of an earlier study. Fifteen years ago, a distinguished group of commentators studied thousands of state supreme court opinions issued between 1870 and 1970, and noted trends in the styles employed by different state courts.[199] They observed that over the years a more expansive, less traditional style was evolving. This new style relied upon secondary sources, including law review articles, more frequently. In addition, more concurring and dissenting opinions were filed. Interestingly, those researchers reported that the top two states that reflected the new style of decision were California and New Jersey, and a state that trailed the others was Tennessee.[200] These are the states that stand out correspondingly in the present study. Assuming that the new style of opinion also included increased reliance upon policy, one may conclude that quite different legal cultures exert different influences on opinion writers, and that these influences persist over time.

One could have a proverbial field day hypothesizing which variables explain the demonstrated patterns of variance. The number of decisions reached in any given jurisdiction does not explain the results systematically,[201] nor does the allocation of decisionmaking in a given jurisdiction between intermediate and highest courts of appeals.[202] One suspects that a rich mix of elements, coming together to form distinctive professional traditions, are at work. One hypothesis may be tested against the data. The retrieval form asked

198. The frequencies for 1983 through 1988 varied around the mean for the period. The frequency for 1989 jumped slightly—from a 1983-88 mean of 14% to 18.6%.

199. *See* Friedman, *supra* note 2; Kagan, Cartwright, Friedman & Wheeler, *The Evolution of State Supreme Courts,* 76 MICH. L. REV. 961 (1978).

200. *See* Kagan, *supra* note 199, at 991-93; Friedman, *supra* note 2, at 818.

201. Thus, although California (second from top) and Pennsylvania (fourth from top) both contributed more than 100 decisions, Louisiana (second from bottom) and Texas (fourth from bottom) did so as well.

202. California, second from the top in frequency of reliance upon policy, contributed only nine high court decisions out of a total of 98 state court decisions; Massachusetts, third from the bottom, contributed twice that number of high court decisions out of a total of only 47. Thus, Massachusetts, one of the least likely to talk policy, published high court products decisions at four times the rate of California, one of the most pro-policy jurisdictions.

whether amicus briefs were filed in a case. The ten jurisdictions that relied more frequently upon policy in Table 7 above also received amicus briefs substantially more frequently in cases that generated policy discussions than did the ten courts in Table 7 that relied upon policy less frequently.[203]

The hypothesis that the cultural/legal environment exerts a strong influence is borne out by the extent to which the federal courts in any given jurisdiction tended to mimic the corresponding state courts with respect to reliance upon policy. More often than not, federal courts in jurisdictions in which state courts relied upon policy frequently also relied upon policy frequently.[204]

Another hypothesis regarding the implications of differing legal cultures is testable against data I have recently collected with my colleague Ted Eisenberg, which we will report in a forthcoming article. In a recently published article, we reported a shift in judicial products liability decisionmaking in the mid-1980s that favored products liability defendants over plaintiffs.[205] In the forthcoming follow-up article, we break down the nationwide shift-in-trend on a state-by-state basis. Thus, based on tentative (but unlikely to change) results in the new "shift-in-trends" work, it is possible to correlate those states that have (and have not) participated in the nationwide shift in lawmaking with those states that, over the same time period, did (and did not) explicitly rely upon policy in their products liability decisions.

Consistent with the results reported above in Table 5, one would hypothesize that those states that have more strongly joined the trend toward change would also have relied more heavily upon policy in doing so, and vice versa. Comparing the results in Table 7 above with the results in our new "shift-in-trends" study, the hypothesis just stated holds up. States participating in the shift-in-trend have tended to rely upon policy much more strongly than have the handful of states that have gone against the trend and have continued "to do business as usual."[206]

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203. The top ten jurisdictions received amicus briefs 26% (19 out of 72) of the time in cases that generated policy discussions; the bottom ten received amicus briefs 19% (10 out of 53) of the time.

204. Of the 15 jurisdictions in Table 7 for which both state and federal frequencies are reported, in only three—Pennsylvania, New York, and Massachusetts—is one type of court significantly below the mean and the other significantly above.

205. *See* Henderson & Eisenberg, *supra* note 91.

206. Twenty states are reported in Table 7. Our new work tentatively shows that five of these went against the shift-in-trend reported in Henderson & Eisenberg, *supra* note 91. Only two of the five appear in the top half of Table 7 (Arizona, 8th; and Illinois, 9th); the other three appear toward the bottom of Table 7 (Indiana, 15th; Texas, 17th; and Massachusetts, 18th).

Conclusion

Based on more than 2500 published products liability decisions by American courts between 1983 and 1990, this study inquires into the nature and frequency of judicial reliance upon public policy. The study reports a number of findings, some of which are reassuring, some surprising. Because academic lawyers are apt to overestimate the frequency with which judges rely upon policy in their opinions,[207] one of the more surprising findings for them may be the most basic of all: courts developed and relied upon policy in only fifteen percent of the products liability decisions comprising the study. Anyone accustomed to working with judicial materials, including law school casebooks characteristically rich in policy discussions, may suspect that this study seriously underestimates the frequency in this regard. Although coding errors undoubtedly occurred, it is unlikely that they were systematic or substantial. Even if one assumes the worst regarding errors of exclusion of cases from the total of those relying upon policy, the overall figure still does not exceed sixteen percent. Moreover, the fifteen percent frequency observed in products liability decisions compares favorably with frequencies observed by student researchers in samples of opinions drawn from other major subject matter areas,[208] and with the frequency reported in an earlier study.[209]

Among the other findings that some readers may find surprising are the ones comparing the importance of the major types of policy invoked in the opinions. Measured both by the frequency with which they were developed and the frequency with which they controlled in decisions, fairness norms appear to have been the most powerful influences, and efficiency norms the least powerful. Given the attention that writers have paid to efficiency norms in the relevant products liability literature, one might have expected just the opposite picture to emerge from the data. When one turns to the subsets of efficiency rationales, the much-touted "market deterrence" rationale received almost no attention in the opinions. Of course, it is possible that efficiency norms influenced judges more than the language in the opinions reveals; but language, after all, is important. What judges are saying cannot be explained away entirely by untestable hypotheses.

Regarding which variables, other than type of policy, affected the frequencies with which courts invoked policy, the study confirms a number of commonly held intuitions. For example, courts were more likely to invoke policy when making or seriously considering new law, when considering a case disposed of as a matter of law at trial, and when filing two or more opinions in the same case. Less intuitively obvious are the findings regarding the types of courts and

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207. It might be said that legal academics specialize in judicial decisions that make law and rely upon policy. My colleagues at Cornell who looked at this study were surprised at how infrequently courts relied upon policy in their published decisions.

208. *See supra* notes 159-60 and accompanying text.

209. *See supra* note 150 and accompanying text.

the differences among jurisdictions. With respect to frequency of reliance upon policy, it does not seem to have mattered very much whether the court rendering the decision was state or federal, or whether the court was trial or appellate. Conversely, it mattered a great deal whether the court was an intermediate or a highest court of appeals. High courts invoked policy more than twice as often as intermediate appellate courts. Perhaps the most interesting findings in the study relate to the levels of variance in frequency among jurisdictions. Among the twenty jurisdictions contributing the greatest number of decisions to the database, the difference in frequencies of reliance upon policy was remarkable. The most policy-oriented jurisdiction invoked policy more than twenty times as frequently as the least. Given that an earlier study of related characteristics in state court opinions identified the same states leading and trailing the rest as are identified in this study, one may conclude that persistent cultural forces are at work influencing opinion writers in the various states.

Taken together, the findings in this Article paint the clearest picture to date of the role of public policy in published judicial opinions. One must be careful to distinguish between what judges say in this regard and what may actually be shaping their decisions. It is reasonable, however, to assume a strong correlation between what they say and what they do. At the very least, judges who explicitly rely upon a certain policy perspective must believe that others, including their colleagues who join the opinion, will find the reasoning persuasive. Indeed, when several judges join in a single opinion presumably read and approved by all, one must posit a conspiracy to dissemble in order to deny judicial candor. The findings in this Article shed important light on how judges both reach and justify their decisions. In the end, a study of this sort has its major appeal in the realm of theory. Law teachers and scholars, more than judges and practitioners, should want to know how the theories they spin out in classrooms and in published scholarship actually influence courts in reaching, or at least explaining and justifying, their decisions.[210]

210. For one American judge's view that legal academic writing has little influence on judicial decisionmaking, see Kaye, *One Judge's View of American Law Review Writing*, 39 J. LEGAL EDUC. 313, 320 (1989).